

CLEAR COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 26

HENRY ANTON PFISTER, PETITIONER,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HARTMAN AND SON,
ET AL.

No. 27

HENRY ANTON PFISTER, PETITIONER,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HARTMAN AND SON,
ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1942.

CERTIORARI GRANTED MARCH 30, 1942.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1941:

No.

IN THE MATTER OF HENRY ANTON PFISTER, DEBTOR.

HENRY ANTON PFISTER,

Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION,

ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD.

**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE SEVENTH CIRCUIT.

Nos. 7631 and 7632..

In the Matter of Henry Anton Pfister, Debtor.

HENRY ANTON PFISTER, APPELLANT,

VS.

**NORTHERN ILLINOIS FINANCE CORPORATION
ET AL., APPELLEES.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.**

Filed March 24, 1941. Kenneth J. Carrick, Clerk.

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**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE SEVENTH CIRCUIT.

Nos. 7631 and 7632.

In the Matter of Henry Anton Pfister, Farmer Debtor.

**HENRY ANTON PFISTER, FARMER DEBTOR,
APPELLANT,**

VS.

**NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK AND HARTMAN
AND SON, APPELLEES.**

**HENRY ANTON PFISTER, FARMER DEBTOR,
APPELLANT,**

VS.

**ALGONQUIN STATE BANK, NORTHERN ILLINOIS
FINANCE CORPORATION, HARTMAN AND
SON, E. C. HOOK, AND EMIL GEEST,
APPELLEES.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN
DIVISION (CHICAGO).**

**CONSOLIDATED FOR THE PURPOSES OF APPEAL BY ORDER OF
THE DISTRICT COURT.**

Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois, on 16th day of December, in the year of our Lord one thousand nine hundred and forty, being one of the days of the regular December Term of said Court, begun Monday, the 16th day of December, and of our Independence the 165th year.

Present: Honorable William H. Holly, William H. McDonnell, U. S. Marshal, Hoyt King, Clerk.

The Following Are Entries From Clerk's Docket In Case Number 72557:

ENTRIES ON CLERK'S BANKRUPTCY DOCKET.

Henry Anton Pfister, Farmer Debtor, Case No. 72557, Section 75.

February 28, 1940.. Petition and schedules filed 9:40 A. M.

February 29, 1940. Order of general reference to William T. Kirby as conciliation commissioner. Holly, Judge.

March 5, 1940. Recommendation of conciliation commissioner recommending approval of petition under 75 filed.

March 28, 1940. Motion of debtor to approve petition as properly filed, filed.

April 25, 1940. Petition of debtor filed under section 75 (s) approved as properly filed, Holly J.

May 23, 1940. Notice filed.

May 23, 1940. Motion of E. C. Hook filed.

May 24, 1940. Motion to strike by Henry Anton Pfister filed.

May 24, 1940. On call. No order—No order on motion to vacate order of April 25th, 1940. Holly J.

July 19, 1940. Amendment to petition under Section 75s filed.

July 20, 1940. Order of adjudication under Section 75s entered by referee Givler on July 20, 1940, filed.

September 17, 1940. Leave to debtor to file petition for restraining order instant and petition set for hearing December 19, 1940. Holly, J.

September 17, 1940. Petition for restraining order filed.

September 19, 1940. Affidavit of J. E. Dazey filed.

September 19, 1940. Notice filed.

September 19, 1940. Answer to petition for emergency restraining order filed.

September 19, 1940. Argument heard on petition of debtor to restrain a certain sale and said petition denied. Holly, J.

October 10, 1940. Application of Culver and Mendelson, 160 North LaSalle Street as association counsel and

4 *Entries on Clerk's Bankruptcy Docket*

Elmer McClain, Lima, Ohio, as chief counsel for debtor filed.

October 15, 1940. Certificate of referee re proceeds under 75 filed.

October 17, 1940. Special appearances and motion to dismiss regarding order of September 7, 1940, filed.

October 17, 1940. Answer to petition for review of the three orders of September 7, 1940, so far as same applies to the order of September 30, 1940, filed.

November 12, 1940. Petition of debtor for review set for hearing December 2, 1940. Holly.

November 30, 1940. Certificate of W. M. Givler filed.

November 30, 1940. Referee's opinion and decision for rehearing and amendment thereto of the court order of August 13, 1940, filed.

November 30, 1940. Order overruling motion of Northern Illinois Finance Company et al. filed.

December 2, 1940. Petition of debtor for review continued to December 7, 1940. Holly, J.

December 16, 1940. Notice and proof of service filed.

December 16, 1940. Petition for review of order of Referee Givler entered August 13, 1940, dismissed. Draft. Petition for review of order of referee Givler entered September 30, 1940, dismissed. Draft. Holly, J.

December 30, 1940. Motion and affidavit filed.

December 30, 1940. Motion of farmer debtor to vacate orders of December 16, 1940, and to reconsider petition for review of farmer debtor entered and continued to January 13, 1941. Holly, J.

January 13, 1941. Motion of debtor to vacate orders of December 16, 1940, and for rehearing taken under advisement. Holly, J.

January 14, 1941. Memorandum of Judge Holly filed.

January 14, 1941. Motion of debtor to vacate orders entered December 16, 1940, denied. Holly, J.

January 14, 1941. Notice of appeal of farmer debtor filed.

January 14, 1941. Bond on appeal filed.

January 14, 1941. Notice of appeal of Henry A. Pfister filed.

January 14, 1941. Bond on appeal filed.

January 20, 1941. Notice filed.

January 20, 1941. Order consolidating pending appeals in the above entitled cause. Draft. Holly, J.

January 20, 1941. Motion for Consolidation filed.

January 22, 1941. Notice filed.

January 22, 1941. Petition of Henry A. Pfister filed.

January 22, 1941. No order, Holly, J.

February 3, 1941. Designation of Contents of Record and Statement of Points filed.

February 5, 1941. Notice filed.

February 5, 1941. Petition of Henry A. Pfister filed.

February 5, 1941. Leave Debtor to withdraw certain documents until February 16, 1941, to prepare copies for trial court record on appeal. Draft. Holly, J.

February 12, 1941. Further designation of contents of Record on appeal filed.

6. *E Entries on Conciliation Commissioner's Docket*

The Following Are Entries from Conciliation Commissioner's Docket No. 72557.

In the Matter of Henry Anton Pfister, Farmer. Claim Docket Page 120 Judge Holly. No. 72557.
Farmer

Attorneys for Debtor: Robert E. Coulson, 404 Citizens Bank Bldg., Waukegan, Illinois, and J. E. Dazey, Findlay, Illinois.

March 1, 1940. Memorandum of order of general reference to William T. Kirby as Conciliation Commissioner filed.

March 1, 1940. Petition and Schedules (Sec. 75) filed.

March 4, 1940. Recommendation filed.

May 1, 1940. Memorandum of petition of debtor filed under Sec. 75 S. approved as properly filed.

May 23, 1940. Debtor's Inventory filed.

May 31, 1940. Notice of first meeting of creditors filed; proof of service.

June 3, 1940. Affidavit of mailing notice of first meeting of creditors filed.

June 6, 1940. Certificate of publication of notice of first meeting of creditors filed.

June 7, 1940. Proof of claim of National Discount Corporation for \$230.75 for secured debt filed.

June 12, 1940. Proof of prior claim for taxes of County Treasurer and Ex-officio County Collector of the County of Lake, Illinois, in the amount of \$1,028.32 filed.

June 29, 1940. Written proposal by debtor to creditors filed.

June 29, 1940. Proof of debt of E. C. Hook in the amount of \$9,758.73 filed.

Entries on Conciliation Commissioner's Docket 7

June 29, 1940. First meeting of creditors. Bankrupt present, sworn and examined. Summary of Bankrupt's examination filed. Motion by E. C. Hook, creditor, to dismiss petition as to sections A to R. Rejection of creditors of proposal, rule on debtor to file counter-proposal. Motion by three creditors for the appointment of a Receiver. Motion that debtor be prevented by order of Referee from removing soil or personal property from farm with the exception of milk, eggs and poultry and that he hold funds received from such sales subject to the order of Court (Dft). Hearing on all motions continued to July 9, 1940, at 10:00 o'clock A. M.

July 5, 1940. Proof of debt of Ralph Herschberger d. b. a. Hershberger Implement Store in the amount of \$96.06 filed.

July 6, 1940. Proof of debt of Emil Geest in the amount of \$6,030.82 filed.

July 9, 1940. Second meeting of creditors held. Motion by E. C. Hook, creditor, to dismiss petition as to Sections A to R heard and allowed. Debtor given fifteen days to file amended petition. Motion by three creditors for appointment of Trustee heard and continued. Further adjourned meeting of creditors continued to July 25, 1940, at 10:00 o'clock A. M. (D. S. T.) (Dft).

July 13, 1940. Proof of debt of Algonquin State Bank in the amount of \$848.00 filed.

July 17, 1940. Secured proof of debt of Hartman and Son in the amount of \$470.00 filed.

July 18, 1940. Secured proof of debt of Northern Illinois Finance Corporation in the amount of \$925.80 filed.

July 23, 1940. Amendment of petition under Section 75 S. filed by debtor.

July 23, 1940. Order of adjudication under Section 75 S and reference to Commissioner.

July 25, 1940. Motion for appointment of Trustee withdrawn. Motion by debtor that appraisers be appointed, and his exemptions set off to him. Motion allowed. Appraisers Louis I. Behm, Grayslake, Illinois; Vernon Rosenthal, Waukegan, Illinois; Frank Green, c/o First National Bank, Woodstock, Illinois, appointed; appraisers' fees set at \$10.00 per diem. Report of appraisers to be filed in five days from date. Exemptions to be set off by Commissioner by August 3, 1940. Leave granted National Discount Corporation, Algonquin State Bank, Northern Illinois Finance Company and Hartman and Sons to file petitions for reclamation and/or for sale of personal property by August 10, 1940 under Sub. Sec. S, paragraph 2. Motion granted. Motion by debtor for hearing on exemptions and all other motions set for hearing August 13, 1940, at 10:00 o'clock A. M. (Daylight Saving Time).

July 25, 1940. Notice of appointment to Appraisers filed.

July 31, 1940. Oath and report of appraisers filed.

August 2, 1940. Commissioner's report of exempted property filed.

August 7, 1940. Petition of Hartman and Son for Reclamation of personal property filed.

August 7, 1940. Petition of Algonquin State Bank for Reclamation of personal property filed.

August 8, 1940. Petition of National Discount Corporation for Reclamation of personal property filed.

August 10, 1940. Petition of Northern Illinois Finance Corporation for Reclamation of personal property filed.

August 10, 1940. Petition of debtor for an order fixing amount of rent for encumbered real estate and personal property.

August 13, 1940. On motion of claimants present, all claims on file as of this date allowed for their respective amounts as filed (Dft). Leave given Hartman and Son to substitute copies of original notes. Motion by E. C. Hook, Algonquin State Bank and Northern Illinois Finance Company that the rent of the farm and personal property be set at the sum of \$1,625.00 for the first year, \$2,125.00 for the second year and \$2,625.00 for the third year, payable in semi-annual instalments, the first payment to be due and payable October 28, 1940. In addition debtor is to pay \$1,625.00 the first year on the principal amount of both secured and unsecured claims (as their interests may appear) in quarterly instalments; \$2,125.00 the second year in quarterly instalments and \$2,625.00 the third year in quarterly instalments. The payment of the first quarterly instalment of 1940 is hereby extended to August 28, 1940. Hearing on motion; motion allowed as per order (Dft). Objection by debtor, hearing thereon and objection overruled. Motion by E. C. Hook and Emil Geest that the buildings be insured for fire and windstorm to their full insurable value, the insurance to be secured by Joseph N. Sikes in standard stock insurance companies, and that he be reimbursed out of the first rents received in proportion to their respective

interests. Hearing on Reclamation Petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank that the personal property described in the petition is perishable within the meaning of paragraph No. 2, SubSec. S. of Sec. 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by debtor as exempted property. Hearing on all further motions and petitions continued to August 30, 1940, at 10:00 o'clock A. M. (D. S. T.).

August 13, 1940. Order approving appraiser's report filed.

August 13, 1940. Order setting aside debtor's exemptions filed.

August 30, 1940. Hearing on all above matters continued to September 7th at 10:00 o'clock A. M. (D. S. T.).

September 3, 1940. Secured proof of debt of Michael H. O'Boyle in the amount of \$432.76 filed.

September 7, 1940. Further hearing had and petitions of Algonquin State Bank, Hartman and Son and Northern Illinois Finance Corporation filed praying for order authorizing sale of certain cattle contained in conditional sales contract and chattel mortgage as perishable property; prayer of petitions granted as per order (Dft).

September 16, 1940. Petition for rehearing by Commissioner of order dated August 13, 1940, filed.

September 20, 1940. Motion by Robert E. Coulson, one of the attorneys for debtor, to withdraw his appear-

ance as attorney; proof of service of notice on debtor and his attorneys filed; motion granted as per order (Dft).

September 20, 1940. Petition for rehearing of order of September 7, 1940, filed and set for hearing September 26, 1940, at 9:30 A. M. (D. S. T.).

September 23, 1940. Amendments to petitions for rehearing of orders of September 7, 1940, and August 13, 1940.

September 26, 1940. Reply of debtor to answer to petition for rehearing of order of September 7, 1940, filed. Notice of amendment by interlineation of above petition and amendment; proof of service.

September 26, 1940. Answer of Algonquin State Bank, Hartman and Son and Northern Illinois Finance Corporation to petition for rehearing of order of September 7, 1940 filed. Leave granted debtor to file affidavit in answer to answer aforesaid. Hearing on petition for rehearing of order of September 7, 1940, had. Motion by E. C. Hook and Emil Geest, Algonquin State Bank, Hartman and Son and Northern Illinois Finance Corporation for leave to file answer to petition for rehearing of order of August 13, 1940, within fifteen days; leave granted. It was stipulated and agreed in the presence of petitioner and farmer debtor present in person that he is now represented by Culver and Mendelson, attorneys, 160 No. La Salle Street, Chicago, Illinois; that any notice of any matters with reference to said proceeding served upon Culver and Mendelson shall be a complete and legal service on him personally. That Elmer McClain, attorney, Lima, Ohio, also represents debtor.

On motion of all parties present, sale of personalty continued to October 15, 1940, at 10:00 o'clock A. M.

September 30, 1940. Commissioner's opinion and decision on petition for rehearing of order of September 7, 1940. Rehearing denied as per order (Dft). (see opinion).

October 1, 1940. Appearance of Walter A. Rice, attorney for National Discount Corporation, filed.

October 3, 1940. Motions by three creditors to strike petition for rehearing of order of August 13, 1940, filed.

October 9, 1940. Petition for review of three orders of September 7, 1940, and order of September 30, 1940, filed.

October 11, 1940. Answer of E. C. Hook and Emil Geest, creditors to the petition of said debtor for rehearing of the order entered herein on August 13, 1940, which petition was filed on September 16, 1940, and the amendment to said petition filed on September 23, 1940.

October 12, 1940. Certificate of Commissioner certifying certain questions to District Court Judges filed. Instruments sent to Clerk with certification.

October 14, 1940. Counter affidavit to that of U. G. Ward in reply to answer of three creditors which reply was filed as of September 26, 1940, filed.

October 14, 1940. Amended answer to amendment by interlineation of petition and amendment for rehearing of orders of September 7, 1940, filed. Notice and affidavit of service filed.

Original affidavit of service of copy of order filed.

November 28, 1940. Further hearing had; motion by creditors E. C. Hook and Emil Geest for leave to amend the answer of October 11, 1940, on its face by adding paragraph 13B. Leave granted and amendment made. Motion by three creditors to withdraw motion No. 1 of October 3, 1940; leave granted. Hearing on Motion No. 2 of October 3, 1940, of three creditors to strike petition for rehearing of order of August 13, 1940, arguments heard; and motion overruled. Hearing had on petition and amendments for rehearing of order of August 13, 1940, and answers filed to such petition and amendments thereto, arguments heard and entire proceeding considered. Petition for rehearing and amendment thereto denied. Petition filed for review of order dated August 13, 1940. Hearing on petition; prayer of petition denied as per order.

November 28, 1940. Commissioner's opinion and decision on petition for rehearing and amendment thereto of order of August 13, 1940, filed as per order. (Dft). Certificate of Commissioner certifying all aforesaid proceedings set for hearing on December 2, 1940, at 10:00 A. M. before Judge Holly, Chicago, Illinois.

November 30, 1940. Petition for review of order of November 28, 1940, denying motion of three creditors filed October 3, 1940:

December 20, 1940. Memorandum of motion before Judge Holly re: petition for review of order entered August 13, 1940, and September 30, 1940. Petitions dismissed.

In the District Court of the United States, Northern District of Illinois, Eastern Division. Henry Anton Pfister, Debtor. No. 72557.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition & Schedules in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 28th day of February, A. D. 1940.

**FARMER DEBTOR'S PETITION UNDER SECTION
75 (a) TO (r) AND SCHEDULES.**

(Filed February 28, 1940, in District Court.)

For Composition or Extension Under Section 75, Act of August 28, 1935, of the National Bankruptcy Act, including Subsection (s), and amendments thereto.

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division.

The Petition of Henry Anton Pfister of Prairie View, in the County of Lake, Northern District, State of Illinois, Farmer and is actively engaged in the raising of grain, livestock, poultry, and dairy products.

Respectfully Represents: That he has had his principal place of business on farm for the greater portion of six months next immediately preceding the filing of this petition at farm near Prairie View, Illinois, within said judicial district; that he is insolvent (or unable to meet his debts as they mature); and that he desires to effect a composition or an extension of time to pay his debts under Section 74 of the Bankruptcy Act.

That the schedule hereto annexed, marked A (1, 2, 3, 4, 5), and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked B (1, 2, 3, 4, 5, 6), and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your Petitioner Prays that his petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

Henry Anton Pfister,
Debtor.

(Duly Verified.)

Schedule A—Statement of All Debts of Bankrupt.

Schedule A-1. Statement of all Creditors to Whom
Priority is Secured by the Act.

b. Taxes due and owing to

- | | |
|--|----------|
| (1) The United States. | None. |
| (2) The State of Illinois, and the County of Lake. | \$500.00 |
| (3) The county, district or municipality of _____, State of _____ | None |

c.

- | | |
|---|-------|
| (1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority. | None. |
|---|-------|

(2) Rent owing to a landlord who is entitled to priority by the laws of the State of _____, accrued within three months before filing the petition, for actual use and occupancy. None.

Total, \$500.00

Schedule A-2. Creditors Holding Securities.

| | Value of Securities | Amount Due or Claimed |
|---|------------------------|-----------------------------|
| Joseph N. Silkes, Trustee, Waukegan, Lake County, Illinois. | | |

A note in the sum of Eight Thousand Dollars (\$8,000.00) dated the 23rd day of September, A. D. 1936, due in three years after date, bearing six per cent until maturity, and seven per cent thereafter, interest payable semi-annually.

Said note is secured by a trust deed, which is recorded in Book 573 of mortgages, on page 178 in the Circuit Clerk's office of Lake County, Illinois, and is a lien on the following described real estate to-wit:

That part of the Southeast Quarter of Section Twenty (20), Township Forty-three (43) North, Range Eleven (11) East of the Third Principal Meridian, bounded and described as follows, Beginning at a point in the South boundary line of said Section, One (1) Chain West from the Southeast corner of said Section, thence North, parallel to the East line of said Section, Twenty-five (25) Chains; thence West to the West line of the

East half of said Southeast quarter; thence South, along the West line of said East half, Twenty-five (25) Chains, to the South boundary line of said Section; thence East, along said South boundary line, to the place of beginning.

Also the following described real estate, to-wit: Beginning at the southeast corner of the West half of the Southeast Quarter of Section Twenty (20), Township Forty-three (43), North, Range Eleven (11) East of the Third Principal Meridian, thence North on said East line, Forty-three (43) Chains and Twenty-four (24) Links; thence West parallel with Section line Nine (9) Chains and Twenty-five (25) Links; thence South, parallel with the east line of the West half of the Southeast Quarter of said Section, Forty-three (43) Chains and Twenty-four (24) Links; to the South Section Line; thence East Nine (9) Chains and Twenty-five (25) Links, to the place of beginning.

Said trust deed at this time is being foreclosed in the Circuit Court of Lake County, Illinois, Docket number in the Circuit Clerk's office is 41,356. \$16,000.00 \$8,000.00

Emil Geest, Prairie View, Illinois.

A judgment by confession in the Circuit Court of Lake County, Illinois, Docket number is 36,982. The amount of said judgment is \$5,703.85.

1.00 5,703.85

Michael H. O'Boyle, Deerfield, Illinois.

A judgment by confession in the Circuit Court of Lake County, Illinois. Docket number is 39,814. The amount of said judgment is \$432.56.

1.00 432.56

Northern Illinois Finance Corporation, a corporation of DeKalb, Illinois.

A conditional sales contract in the sum of \$1,100.00, secured by certain livestock, which is fully described in said sales contract.

2,000.00 1,100.00

Algonquin State Bank, a corporation of Algonquin, Illinois.

A conditional sales contract in the sum of \$870.00, secured by certain livestock, which is fully described in said sales contract.

2,000.00 870.00

The above conditional sales contracts cover the same property in part.

National Discount Credit Corporation, Waukegan, Illinois.

A sales contract in the sum of \$258.00, secured by one 1937 four-door sedan Oldsmobile Automobile.

275.00 258.00

Total, \$16,364.41

Schedule A-3. Creditors Whose Claims Are Unsecured.

Hartman & Son, a co-partnership, Hampshire, Illinois.

A note in the sum of \$470.00 \$470.00

Herschburger Implements, a copartnership, Prairie View, Illinois. Open Account. 90.00

George B. Umbdenstock, Prairie View, Illinois, open account, 80.00

Total, \$640.00

Schedule A-4. Liabilities on Notes or Bills Discounted
Which Ought to be Paid by the Drawers, Makers,
Acceptors, or Indorsers.

None.

Schedule A-5. Accommodation Paper

None.

Oath To Schedule A (Duly Verified).

Schedule B.—Statement of All property of Bankrupt.

Schedule B-1. Real Estate.

Estimated
value of
debtor's
interest.

See Schedule A-2 for description. Estimate
value of debtor's

\$8,000.00

Schedule B-2. Personal Property.

A. Cash on hand.

None.

B. Negotiable and non-negotiable instru-
ments and securities of any description, includ-
ing stocks in incorporated companies, interests
in joint stock companies, and the like (each to be
set out separately).

None.

C. Stock in trade, in business of , at
of the value of

None.

D. Household goods and furniture, house-
hold stores, wearing apparel and ornaments of the
person:

5 beds and bedding, \$25.00; 1 cook stove, \$5.00;
1 heating stove, \$5.00; 1 set of dishes, \$5.00; 1 set
of kitchen utensils, \$5.00; 3 rugs, \$15.00; 6 chairs,
\$5.00; 4 rocking chairs, \$5.00; 1 sideboard, \$5.00;
1 davenport, \$5.00; 1 sewing machine, \$5.00; 1
radio, \$5.00; 3 dressers, \$15.00; 1 set of garden
tools, \$2.00

\$107.00

E. Books, prints and pictures.

None.

F. Horses, cows, sheep, and other animals
(with number of each)

1 black horse, \$35.00; 1 black horse, \$35.00;
1 black horse, \$20.00; 4 yearling heifers, \$60.00;
20 dairy cows and 1 bull, \$2,000.00, 5 brood sows,
\$40.00; 15 pigs, \$20.00; 130 hens, \$50.00; (\$2,260.00)

All of the last described property, except 4 year-
ling heifers, 5 brood sows, 15 pigs, and 130 hens,
are included in the two conditional sales contracts
set out on schedule A-2, leaving property to the
value of \$170.00 not encumbered; and the equity
over and above the conditional sale contracts in
the property therein described is \$1.00, making
a total of exempt property the sum of

171.00

G. Automobiles and other vehicles

One 1937 four-door sedan Oldsmobile Auto-
mobile \$275.00, encumbered \$258.00, equity \$17.00.
(See schedule A2); 2 farm wagons, \$10.00.

27.00

H. Farming stock and implements of hus-
bandry.

None.

I. Shipping, and shares in vessels

None.

J. Machinery, fixtures, apparatus, and tools
used in business, with the place where each is
situated.

One 1927 tractor, plow, disc, \$50.00; 1 corn
planter, \$5.00; 1 wheat drill, \$5.00; 2 old har-
rows, \$5.00; 1 walking plow, \$1.00; 1 riding plow,
\$5.00; 1 set of work harness, \$5.00; 1 hay rake,
\$3.00; 1 hay loader, 1927, \$5.00; 1 manure spreader.
1930, \$10.00

94.00

K. Patents, copyrights, and trademarks.

None.

L. Goods or personal property of any other
description, with the place where each is situated.

1 lot of ear corn, about 400 bushels, \$150.00;
6 tons of soy bean hay, \$30.00; 1 lot of shredded

| | |
|--|--------|
| fodder, \$10.00; 1 lot of ensilage, \$10.00; 100 bush- | |
| els of oats, \$30.00; 80 bushels of barley, \$35.00; | |
| 1 lot of rye, \$5.00; 1 lot of wheat, \$5.00. | 275.00 |

| | |
|--------|----------|
| Total, | \$674.00 |
|--------|----------|

Schedule B-3. Choses in Action.

| | |
|--|-------|
| A. Debts due petitioner on open account. | None. |
| B. Policies of insurance. | None. |
| C. Unliquidated claims of every nature, with their estimated value. | None. |
| D. Deposits of money in banking institu- tions and elsewhere. | None. |

Schedule B-4. Property in Reversion, Remainder, or Ex-
pectancy, Including Property Held in Trust for the Debtor
or Subject to Any Power or Right to Dispose Of or to
Charge.

General
Interest

| | |
|---|-------|
| Interest in land. | None. |
| Personal property. | None. |
| Property in money, stock, shares, bonds, annuities, etc. | None. |
| Rights and powers, legacies and bequests. | None. |
| Total, | None. |

Property heretofore conveyed for benefit of
creditors.

Portion of debtor's property conveyed by
deed of assignment, or otherwise, for the benefit
of creditors; date of such deed, name and address
of party to whom conveyed; amount realized
therefrom, and disposal of same, as far as known
to debtor.

None.

Attorney's Fees.

Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.

None.

Total, None.

Schedule B-5. Property Claimed As Exempt from the Operation of the Act of Congress Relating to Bankruptcy.

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.

None.

Property claimed to be exempt by State laws, with reference to the statute creating the exemption.

All personal property unencumbered and all equities in encumbered properties described on schedule B-2 to the extent of \$400.00. The petitioner herein is the head of a family with whom he resides and supports, and is entitled by the statute of Illinois to exempt personal property to the amount of \$400.00.

The petitioner herein claims a homestead in and to the real estate herein described to the extent of \$1,000.00 against all creditors, except the mortgages and said trustee.

\$674.00

Total, \$674.00

Schedule B-6. Books, Papers, Deeds, and Writings Relating to Debtor's Business and Estate.

Books. None.

Deeds. None.

Papers. None.

Oath to Schedule B (Duly verified).

SUMMARY OF DEBTS AND ASSETS.

(From the statements of the debtor in Schedules
A and B.)

| | | | |
|-------------------|---------|---|--------------------|
| Schedule A— | 1-a | Wages | None |
| | 1-b (1) | Taxes due United States | None |
| Schedule A— | 1-b (2) | Taxes due States | 500.00 |
| Schedule A— | 1-b (3) | Taxes due counties, districts and mu- nicipalities | None |
| Schedule A— | 1-c (1) | Debts due any person, including the United States, having prior- ity by laws of the United States | None |
| Schedule A— | 1-c (2) | Rent having priority | None |
| Schedule A— | 2 | Secured claims | 16,364.41 |
| Schedule A— | 3 | Unsecured claims | 640.00 |
| Schedule A— | 4 | Notes and bills which ought to be paid by other parties thereto | None |
| Schedule A— | 5 | Accommodation paper | None |
| Schedule A, Total | | | <u>\$17,504.41</u> |
| Schedule B— | 1 | Real estate | 8,000.00 |
| Schedule B— | 2a | Cash on hand | None |
| Schedule B— | 2-b | Negotiable and nonne- gotiable instruments and securities | None |
| Schedule B— | 2-c | Stock in trade | None |
| Schedule B— | 2-d | Household goods | 107.00 |
| Schedule B— | 2-e | Books, prints, and pic- tures | None |

| | | | |
|-------------------|-----|--|------------|
| Schedule B— | 2-f | Horses, cows, and other animals | 171.00 |
| Schedule B— | 2-g | Automobiles and other vehicles | 27.00 |
| Schedule B— | 2-h | Farming stock and implements | None |
| Schedule B— | 2-i | Shipping and shares in vessels | None |
| Schedule B— | 2-j | Machinery, fixtures, and tools | 94.00 |
| Schedule B— | 2-k | Patents, copyrights, and trade-marks | None |
| Schedule B— | 2-l | Other personal property | 275.00 |
| Schedule B— | 3-a | Debts due on open accounts | None |
| Schedule B— | 3-b | Policies of insurance | None |
| Schedule B— | 3-c | Unliquidated claims | None |
| Schedule B— | 3-d | Deposits of money in, banks and elsewhere | None |
| Schedule B— | 4 | Property in reversion, remainder, expectancy or trust. | None |
| Schedule B— | 5 | Property claimed as exempt \$1,400.00 | |
| Schedule B— | 6 | Books, deeds and papers | None |
| Schedule B, Total | | | \$8,674.00 |

And afterwards, to wit, on the 29th day of February, A. D. 1940, being one of the days of the regular February term of said Court, in the record of proceedings thereof,

in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

In the District Court of the United States For the Northern District of Illinois Eastern Division. In the Matter of Henry Anton Pfister, Debtor. No. 72557. Thursday, February 29th, A. D. 1940.

Present: Hon. William H. Holly, District Judge.

On motion of the Court it is

Ordered that this cause be and the same is hereby generally referred to William T. Kirby, Conciliation Commissioner.

And on, to wit, the 19th day of July, A. D. 1940, came the Debtor by his attorneys and filed in the Clerk's office of said Court his certain Petition under Section 75 (s) in words and figures following, to wit:

**FARMER/DEBTOR'S AMENDED PETITION UNDER
SECTION 75 (s).**

Filed July 19, 1940, in District Court.

To the Honorable the Judges of this Court:

The Petition of Henry Anton Pfister respectfully shows:

I. That on the 14th day of February, 1940, petitioner filed his petition for a composition or extension under Section 75 of the Bankruptcy Act, which said petition was thereafter duly approved and the proceeding referred to Honorable William T. Kirby, one of the Conciliation Commissioners of this Court.

II. That petitioner (1) has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by said composition or extension proposal.

Wherefore, petitioner hereby amends his said petition pursuant to the provisions of Section 75 (s) of the Bankruptcy Act and asks to be adjudged a bankrupt, and for such other and further relief to which he may be entitled.

Henry Anton Pfister,
Debtor.

Signed: J. E. Dazey,

R. C. Coulson,

Findlay, Illinois,

Waukegan, Illinois,

Attorneys for Debtor.

Office and Post Office Address.

(Duly verified.)

And afterwards, to wit, on the 20th day of July, A. D. 1940, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

ADJUDICATION ON AMENDED PETITION UNDER
SECTION 75 (s).

Entered July 20, 1940, in District Court.

At Chicago, in said District, upon this 20th day of July, 1940:

This matter coming on to be heard upon the amendment of the petition of Henry Anton Pfister, requesting to be adjudged a bankrupt, as provided by Section 75, sub-section (S) of the Bankruptcy Act, and that the same having been heard and considered, and it appearing to the Court that the said request should be granted;

It Is Ordered that the said Henry Anton Pfister, be, and he is hereby, adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, as provided by Section 75, sub-section (S) of the Bankruptcy Act as amended, and that further proceedings be had in accordance with such section before Walter Givler, County of Lake, Waukegan, Illinois.

Holly,

District Judge.

And on, to wit, the 17th day of September, A. D. 1940, came the Debtor by his attorneys and filed in the Clerk's office of said Court his certain Petition for Restraining Order in words and figures following, to wit:

**PETITION FOR EMERGENCY RESTRAINING
ORDER.**

Filed September 17, 1940, in District Court.

To the said Court or to any Judge thereof:

The said farmer debtor respectfully represents:

1. This matter was on or about July 23, 1940, by order of this court referred to the Honorable Walter M. Givler, conciliation commissioner for Lake County, Illinois, at Waukegan in said county and has been so pending to this moment, pursuant to the farmer debtor's amended petition under Section 75 (s) of the Bankruptcy Act.

28 *Petition for Emergency Restraining Order*

2. The appraisal of all of the property of said farmer debtor's estate approved by said conciliation commissioner is as follows:

Real estate consisting of a gross acreage of 87 1/2 acres of which approximately 5 acres is subject to drainage easement \$16,000.00

| | |
|-------------------------------|-----------|
| Household and garden utensils | \$ 107.00 |
| 3 Horses | 90.00 |
| 4 Yearling heifers | 60.00 |
| 18 Dairy cows | 1170.00 |
| 1 Bull | 100.00 |
| 20 Hogs | 60.00 |
| 130 Poultry | 50.00 |
| 1 Automobile | 275.00 |
| Farming equipment | 274.00 |

| | | |
|--|-----------|----------|
| Total of household goods, garden utensils, livestock, automobile and farming equipment | \$2186.00 | 2,186.00 |
|--|-----------|----------|

of which the following personal property was so set off as exempt:

| | |
|-------------------------------|----------|
| Household and garden utensils | \$107.00 |
| Equity in automobile | 44.00 |
| Farm Equipment | 249.00 |

| | |
|-----------------------------------|----------|
| Total personal property exemption | \$400.00 |
|-----------------------------------|----------|

Thus leaving, after setting of said exemptions the following personal property in said estate subject to the provisions of Section 75:

3 Horses
4 Yearling heifers
18 Dairy cows

1 Bull

20 Hogs

130 Poultry.

1 Automobile (of which \$44 is exempt out of a total valuation of \$275).

Farming equipment to the value of \$25.

(\$274 total value, \$249 exempt).

Total value of personal property not exempt \$1786.00

Of said personal property the only revenue producing portion is 18 dairy cows while fresh (each cow being out of production and a dead expense for an average period of two to four months each year); 20 hogs which can produce nothing except sale value once, and 130 poultry; said dairy cows being practically the sole income producing chattels.

Said real estate is not capable of producing sufficient feed forage and bedding for said livestock and therefore in itself produces no direct revenue, or if there be any it is more than off set by the necessity of purchasing feed, forage, bedding, medicines, and veterinary services for said livestock.

3. On August 13, 1940, an order was entered by said conciliation commissioner which said order provides for a stay of proceedings against the said farmer debtor or his property for a period of three years from April 26, 1940. Said order is contrary to the provisions of Section 75. (s) (2).

4. Said order entered by said conciliation commissioner on August 13, 1940, further provides for rental payments during said three years beginning April 26, 1940, of \$2,125.00 per year payable in semi-annual installments.

of \$812.50 the first year, \$1,062.50 the second year, and \$1,312.50 the third year; the first installment to be paid on October 26, 1940, being a total of \$6,375.00 to be paid as rental for said three year period running from April 26, 1940. Said order fixing said rental period running from April 26, 1940, is contrary to the provisions of Section 75 (s) (2).

5. Said order entered by said conciliation commissioner on August 13, 1940, further provides for certain payments to be made quarterly, in addition to said rental, in installments of \$406.25 quarterly the first year (being a total of \$1,625.00 the first year); of \$531.25 the second year (being a total of \$2,125.00 the second year); and of \$656.25 the third year (being a total of \$2,625.00 the third year), or a total for the three years of \$6,375.00 in addition to total rental payments of \$6,375.00 during the same period which is a grand total of all rental and additional payments of \$12,750.00 for the three year period beginning April 26, 1940, being an average annual payment of \$4,250.00 per year for each of the said three years.

6. Said order bears the written approval of three creditors of said farmer debtor, namely, Northern Illinois Finance Company, Algonquin State Bank, and E. C. Hook, and no other approval. Said order was not presented to said farmer debtor or to his counsel and was not approved by him or by his counsel. No objection was entered by the farmer debtor to said order and no hearing on any such objection has been had. Said farmer debtor at all times during the pendency of said reference desired, and he still desires, to present evidence upon the subjects

of said order but he has not had opportunity to do so. The evidence to be so presented, if opportunity be afforded to present it, will demonstrate that said sums of rental and said sums of additional payments are not pursuant to law. Said period fixed for the retention of possession of his property by the farmer debtor is contrary to law. Said period fixed for the said stay of proceedings is contrary to law. Your petitioner, the farmer debtor herein, has filed with and there is now pending before said conciliation commissioner his petition for a rehearing on the subject of said order of August 13, 1940.

7. The docket of said conciliation commissioner in said matter contains among others the following memoranda:

"August 7, 1940. Petition of Hartman and Son for reclamation of personal property filed.

"August 7, 1940. Petition of Algonquin State Bank for reclamation of personal property filed.

"August 8, 1940. Petition of National Discount Credit Corporation for reclamation of personal property filed.

"August 10, 1940. Petition of Northern Illinois Finance Company for reclamation of personal property filed.

"August 13, 1940. * * * Hearing on reclamation petition and stipulations by debtor and each of the following claimants: Hartman and Son; Northern Illinois Finance Company; and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph number (2) subsection (s) of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the reclamation petitions

is not at this time claimed by bankrupt as exempt property. Hearing on all further motions and petitions continued to August 30, 1940, at 10⁰⁰a. m., D. S. T."

• • • • • • •
 "August 30, 1940. Hearing on all above matters continued to September 10, 10 A. M. DST."

• • • • • • •
 "September 7, 1940. Further hearing had and petition of Algonquin State Bank, Hartman and Son, and Northern Illinois Finance Company filed praying for order authorizing sale of certain cattle contained in conditional sales contract and chattel mortgage as perishable property, prayer of petitions granted as per order (Dft)."

8. Your petitioner, the undersigned farmer debtor, further represents that no order pursuant to the memorandum above quoted from the said conciliation commissioner's docket, dated September 7, 1940, has been issued or entered by said conciliation commissioner.

9. Your petitioner further respectfully represents that although no order for the sale of his cattle or other chattels has been issued or entered by said conciliation commissioner, he has been informed and believes and therefore avers that said conciliation commissioner proposes to issue an order of sale directing the sale of said cattle or other chattels at the end of ten days from September 7, 1940, which period of ten days will expire on September 17, 1940.

10. Your petitioner further avers that neither he nor his counsel admitted or consented or stipulated in any manner as stated or inferred by said memorandum quoted

above from the said conciliation commissioner's docket under date of August 13, 1940, that any of his personal property described in the petition or elsewhere is perishable within the meaning of any portion of Section 75 of the Bankruptcy Act.

11. Upon the issuance or entry of an order by said conciliation commissioner pursuant to said memorandum above quoted from said conciliation commissioner's docket dated September 7, 1940, your petitioner desires to obtain a rehearing of said matter or to file a petition for review thereof or both as the necessity of the situation may require for the protection of his rights under Section 75.

12. Your petitioner says that it is absolutely necessary for the preservation of his rights under Section 75 of the Bankruptcy Act that the said conciliation commissioner be restrained from proceeding with the sale of any of your petitioner's property until he shall have first entered an order therefor.

Wherefore your petitioner prays the court to issue an order restraining the said conciliation commissioner, the Honorable Walter M. Givler, conciliation commissioner for Lake County, Illinois, from proceeding in any manner to sell or have sold any of the property of your petitioner until he shall have first entered and issued an order therefor.

Henry Anton Pfister

Farmer Debtor

(Duly verified positively by Henry Anton Pfister,
Farmer Debtor.)

Affidavit of J. E. Dazey

(Duly verified by Robert E. Coulson as counsel of record for said farmer debtor.)

(Duly verified by Elmer McClain as one of counsel for said farmer debtor.)

And on, to wit, the 19th day of September, A. D. 1940, came the Debtor by his attorneys and filed in the Clerk's office of said Court his certain Affidavit of J. E. Dazey in words and figures following, to wit:

AFFIDAVIT OF J. E. DAZEY.

Filed September 19, 1940, in District Court.

To: The Honorable William H. Holly, Judge.

J. E. Dazey, being first duly sworn, states that he is a resident of Findlay, Shelby County, Illinois. That he is a duly licensed attorney and has been for twenty-five years last past. That he is the attorney for Henry Anton Pfister, Bankruptcy No. 72557.

That the affiant became ill on or-to-wit the 21st day of May, A. D. 1940, with high-blood pressure, which resulted in a stroke of apoplexy on his left side and from that time since has not been able to attend to any case in court, and has only been able to do a small amount of office work and that his blood pressure during these months past has been as high as two hundred thirty-two and is one hundred ninety-two at this time.

That on the filing of the case above referred to, your affiant obtained the services of one Robert E. Coulson of Waukegan, Lake County, Illinois, who is a young attorney beginning a practice at this time and that he at no time has been authorized by me to take any steps in said case

only to file papers prepared by myself and mailed to him, and up and until the 7th inst. did not know he had made any stipulations or filed any papers of any kind or character in reference to the case at bar.

Further your affiant sayeth not.

(Seal)

J. E. Dazey.

(Duly certified.)

And on, to wit, the 19th day of September, A. D. 1940, came the Algonquin State Bank by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

**ANSWER TO PETITION FOR EMERGENCY
RESTRAINING ORDER.**

Filed September 19, 1940, in District Court.

To the Honorable Judge Holly:

Now comes the Algonquin State Bank, an Illinois banking corporation, by Henry L. Cowlin, its attorney, Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman & Son, by Elmer C. Tobin, their attorney, and the Northern Illinois Finance Company, a Delaware corporation, by Carbary & Teschke, its attorneys, and for answer to the petition for emergency restraining order, say:

1. They admit the allegations in Paragraph 1 of said complaint contained.
2. They neither admit nor deny the allegations in paragraph 2 thereof with reference to the value and list of personal property therein contained, but deny that the

eighteen dairy cattle are the only revenue-producing personal property of said debtor. They deny the last paragraph of paragraph 2 of said petition.

3. They neither admit nor deny the allegations in paragraph 3 but do deny the conclusion in the last sentence thereof.

4. They aver in answer to paragraph 4 of said petition that the amounts therein described to be paid by said debtor are substantially the same as the oral offer made by said petitioner on the 13th day of August, A. D. 1940, the date of the entry of said order, and deny that such order is contrary to the provisions of Section 75 S 2.

5. They admit the allegations in paragraph 5 of said petition, contained and aver that same is substantially the offer orally made by said debtor petitioner as aforesaid through his counsel to the conciliation commissioner.

6. As to the allegations in Paragraph 6 of said petition contained, the undersigned avers that said farmer debtor was represented at each and every hearing in said matter before said conciliation commissioner by one Robert Coulson, signatory to the affidavit to the petition filed herein, who is a duly licensed and practicing attorney in this State with offices at Waukegan, Illinois, the city at which all of the hearings herein were had; that said Coulson was present and advised of each and every order and proceedings had at each and all of the hearings before said conciliation commissioner, had ample opportunity to present plans and make objections to orders entered within the time and manner provided by

law or to appeal therefrom if he so desired; that said Coulson, as such attorney for said farmer debtor, was present on the date of the entry of the order in paragraph 6 of said petition alleged; that the first payment due under said order was on the 28th day of August, A. D. 1940; that on the 26th day of August, A. D. 1940, he sent a letter to the attorneys representing the undersigned creditors, a copy of which is hereto attached and marked Exhibit A, in and by which said letter said Robert Coulson, as such attorney, proposed to ask for an extension of time to prepare objections and motions with regard to the commissioner's findings as to rent to be paid; that said Coulson obtained a continuance of the matters before said conciliation commissioner to and until the 7th day of September, A. D. 1940, that on the 7th day of September, A. D. 1940, the date to which said hearing was, on the motion of said Coulson, continued; no such objections or motions were made by the said Coulson on behalf of said farmer debtor; that at said hearing of September 7, A. D. 1940, the said debtor farmer was present in person and was also represented at said hearing by the said Robert Coulson, his attorney, and by Attorney U. G. Ward of Shelbyville, Illinois, but no such objections or motions were filed herein either by the said debtor farmer or for him through either of his said attorneys so present at said hearing; that at said hearing of September 7, A. D. 1940, said debtor farmer was asked in the presence of said conciliation commissioner and in the presence of his attorneys, by the undersigned creditors and by the conciliation commissioner, if he had any other or further offer to make with reference to his ability

to pay rent or on the principal of said indebtedness, to which said debtor and his attorneys replied they did not; that at said hearings before said conciliation commissioner the said debtor farmer, through his counsel, Robert E. Coulson, has been repeatedly requested to attend such hearings and submit such plans as he might have with reference thereto, all of which requests were neglected or refused by said debtor farmer; that the said debtor farmer has had ample opportunity to file objections and make proposals and offers within the time and manner provided for under the law; that no petition for rehearing on the subject of the order of August 13, A. D. 1940, has been filed with said conciliation commissioner so far as the undersigned are advised.

7. That they neither admit nor deny the allegations in paragraph 7 of said petition.

8. They deny the allegations in paragraph 8 of said petition contained and aver that orders have been entered by said conciliation commissioner for the sale of said property on the 7th day of September, A. D. 1940, on the petition of the undersigned, a copy of the order on the petition of the Hartman & Sons, being hereto attached and marked "Exhibit B"; that on said date a further order was entered setting the date of said sale, a copy of which is hereto attached and marked "Exhibit C."

9. They deny each and all of the allegations in paragraph 9 of said petition contained.

10. They deny the allegations in paragraph 10 of said petition contained and on the contrary aver that on

the 13th day of September, A. D. 1940, they appeared before said conciliation commissioner with witnesses to make proof of the facts contained in their petitions for sale of the personal property therein described then on file in said cause, swore one of the witnesses to make such proof, whereupon one Robert Coulson, attorney of record for said debtor and representing him at said hearing, waived such proof and stipulated that said cattle were perishable under the provisions of Section 75 of said bankrupt act, and waived any proof in that regard on behalf of the undersigned, and that said commissioner so found, as will appear by his findings more fully set forth in his orders thereon, a copy of one of which is hereto attached and marked "Exhibit B."

11. The undersigned further deny that said petitioner is entitled to the relief prayed for under paragraph 11 of said petition for the reason that said order is entered as of September 7, A. D. 1940, and that the time for appeal or review thereof has gone by.

12. Your petitioners deny the allegations under paragraph 12 of said petition.

The undersigned therefore say that said petitioner is not entitled to the relief prayed for under said petition or any part thereof and request that same be dismissed at petitioner's cost.

The Algonquin State Bank, etc.
Hartman & Son, co-partners.
Northern Illinois Finance Co., etc.

(Duly verified by attorneys.)

Exhibits "A" and "B"

EXHIBIT "A."

August 26, 1940

Dear Sir:

In re: Henry A. Pfister

In order to save you a trip to Waukegan, if possible, I am writing now to inform you that at the hearing of this matter on Wednesday, August 28, I propose to ask the Commissioner for an extension of time within which to prepare objections and motions with regard to the Commissioner's findings as to rent to be paid on this property.

Yours very truly,

REC:LH

(Signed) Robert E. Coulson.

EXHIBIT "B."

This matter having come on to be heard this 7th day of September, 1940, upon the petitions of the Algonquin State Bank, Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman and Son, and the Northern Illinois Finance Corporation, a Delaware corporation, for the sale of certain cattle described in the petitions therein as perishable property, under the terms of Section 75S of the Bankruptcy Act, and the Court having entered orders upon their respective petition for sale of said perishable property,

It Is Hereby Ordered that William Chandler be and he is hereby appointed the officer of this Court to sell the cattle, horses and cows contained in the respective orders hereinabove referred to, and that said sale be held pursuant to said orders on the 30th day of September, A. D. 1940.

Walter M. Givler
Judge

And afterwards, to wit, on the 19th day of September, A. D. _____, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge, appears the following entry, to wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Debtor. No. 72557.

**MEMORANDUM OF DISTRICT JUDGE DENYING
PETITION TO RESTRAIN SALE.**

Entered September 19, 1940, in District Court.

Thursday, September 19th, A. D. 1940.

Present: Hon. William H. Holly, District Judge.

This cause coming on to be heard on the debtor's petition to restrain a certain sale, the Court having heard the arguments of counsel and being advised in the premises.

It Is Ordered that the prayer of said petition be and the same is hereby denied.

And on, to wit, the 7th day of August, A. D. 1940, came Hartman & Son by their attorneys and filed in the Clerk's office of said Court their certain Petition to Reclaim or Sell Certain Cattle in words and figures following, to wit:

PETITION OF HARTMAN AND SON TO RECLAIM OR
SELL CATTLE.

Filed August 7, 1940, with Conciliation Commissioner.

To the Honorable Walter M. Givler, Referee:

Your petitioners, Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman & Sons respectfully show and allege as follows:

1. That they are a co-partnership doing business as aforesaid and with their principal place of business in the Town of Hampshire, Kan. County, Illinois.

2. That at various dates and times, from the 9th day of October, A. D. 1937, to the 28th day of October, A. D. 1939, they delivered unto the above named debtor various dairy cattle for use in his farming enterprise under certain contracts and agreements commonly known as conditional sales notes, under and by virtue of which the title to said cows so delivered the said debtor were to remain in your petitioners until the full purchase price thereof had been paid in cash, and that there now remains due and owing to your petitioners from said debtor upon the above mentioned sales note the sum of \$470.00, together with interest thereon from May 4, A. D. 1940, to this date.

3. That the above named debtor, on or about the 25th day of April, A. D. 1940, filed his petition in this Court, praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankrupt Act; that a first hearing was held under said petition at which a proposal to his credi-

tors was duly made in writing by the said debtor; that said proposal was not accepted and thereupon the said debtor filed his petition herein under sub-Section S of said Section 75 and requested that he be adjudicated a bankrupt herein; that thereupon, on motion of said debtor, appraisers were appointed to appraise his personal property and to set off his exemptions.

That your petitioner, in ignorance of the filing of said petition, accepted a subsequent note dated May 4, 1940, and marked the note hereto attached as renewed by said note, but the filing of said petition by said debtor automatically cancelled the effect of said note of May 4th, 1940.

4. That listed among the assets in said estate were five certain dairy cows, four of which now bear ear tag numbers 3274711, BN12098, 295720 and H189; that one other cow sold by your petitioners to the said Henry Pfister has lost her ear tag number; that such cow so losing said ear tag number is a Guernsey cow and was identified by said debtor to your petitioners as one of the cows so delivered said debtor by them; that said cows bearing ear tag numbers aforesaid and said Guernsey cow in this paragraph mentioned were cattle delivered by your petitioner to said debtor under the above mentioned conditional sales contracts and to which the title now remains in your petitioners under and by virtue of the terms of said note of October 28, 1939, copy of which is hereto attached and marked Exhibit A.

5. That the various notes and written memorandum under which said cattle were delivered have from time to time and on various dates been renewed, to and until

the 28th day of October, A. D. 1939, when said debtor executed and delivered unto your petitioners his certain conditional sales note, copy of which is hereto attached and marked Exhibit A, the original of said note being now on file in this cause with the original claim of these petitioners.

6. That since the execution and delivery of said note, copy of which is hereto attached and marked Exhibit A, and since the filing of the petition herein by the debtor, the said debtor has, contrary to the terms and provisions of this Act, sold and disposed of two of the cattle mentioned in the above mentioned note and the property and security of your petitioners, said sale being made unbeknown to your petitioners; that dairy cattle as such are subject to so many unforeseen and unpredictable maladies and can and may be so easily spoiled or ruined through careless and improper handling; as to make them perishable property within the meaning of this Act.

7. That said cattle so described in said note are not the property of said debtor; that the only interest he has therein is the right of purchase thereof by the payment of the amount specified in said notes; that by virtue thereof and by virtue of the statutes in such case made and provided, the said debtor has no right of exemption in and to said cattle above described; that if said cattle are allowed to remain in said herd and in the possession of said debtor under said Act, it will create a possible total loss to your petitioners of all security held by them on said cattle; that said cattle being allowed to remain in said dairy would, under the terms and conditions of this Act, be rendered useless for dairy purposes, unsaleable and fit

only for slaughter purposes at a considerably reduced value.

8. That your petitioner, in view of the facts aforesaid, namely: the sale of such cattle unbeknown to your petitioners and in view of the perishable character of the said property, feels himself unsafe and insecure as defined in his said notes, and has and does hereby elect to declare the balance due on his said notes and to reclaim possession of said cattle; that if said order be not entered allowing him to reclaim his said cattle, that then said cattle be sold as perishable property under the terms and conditions of this Act.

Wherefore, your petitioners pray that an order be entered herein directing said bankrupt to turn over unto your petitioners the following described cattle:

Cows bearing ear tag numbers 3274711, BN12098, 295720 and H189.

1 Guernsey cow bearing no ear tag number.

Your petitioner further prays that in case he be not allowed to reclaim his property as in the preceding paragraph prayed, that then and in that event an order be entered herein directing the sale of each and all of said dairy cattle hereinabove described as perishable property in accordance with the statute in such case made and provided, at either private or public sale at the discretion of the Court.

Respectfully submitted,

Hartman & Son,
By Harvey Hartman.

(Duly verified)

EXHIBIT A.

\$550.00

Hampshire, Illinois, October 28, 1939.

6 Months after date, for value received, I or we promise to pay Hartman & Son, or order Five Hundred Fifty 00/100 Dollars at their office in Hampshire, Illinois, or wherever holder hereof may from time to time in writing appoint, with interest at the rate of seven per cent per annum, payable semi-annually after date until paid.

This Note is Given for 7 cows - J556742 - H189 - ES 54296 295720 - 32-74711 - CW 34849 - BN 12098.

I or we agree that no extension of the time of payment of this note shall release me from the payment of the same. If this note is collected without suit by a person other than the owner, then I agree to pay the person collecting the same a reasonable fee for collecting it. It is further expressly understood and agreed, that the title to the property for which this note is given shall remain in the payee until this note or judgment rendered thereon is fully paid, and in case of default in the payment of this note or the interest thereon, or if the payee shall feel insecure or unsafe the payee is hereby given the right to take immediate possession of, and remove and sell said property at either public or private sale, with or without notice as the holder hereof may elect. Maker hereby waives all right to any notice of such sale, whether by law provided or otherwise. In case of sale, surplus from such sale shall be paid to the signers hereof.

And to secure the payment of said amount I hereby authorize any attorney of any court of record to appear for

me in any such court, in term or vacation, at any time after the signing of this note, whether the same due by its terms or not, and confess a judgment without process in favor of the holder of this note for such amount as may be unpaid thereon, together with costs and Ten Dollars and ten per cent on the amount due on said note in addition thereon for attorney fees, and also to file cognovit for said amount and to waive and release all errors which may intervene in any such proceeding and consent to immediate execution upon such judgment, and I further agree that no writ or error or appeal shall be prosecuted on the judgment entered by virtue hereof nor any bill in equity filed to interfere in any manner, with the operation of said judgment; hereby ratifying and confirming all that my said attorney may do by virtue hereof. And the endorsers, signers and guarantors severally waive presentation for payment, protest, and notice of protest and notice of payment of this note and diligence in bringing suit against any party to this note.

H. A. Pfister (Seal)

(Seal)

No. 53206 Due April 28, 1940.

Across the face of the two preceding paragraphs is written: Renewal May 4 1940. Hartman & Son A H

Endorsements on Back.

For value received, each of the undersigned hereby guarantees the payment of the within note at maturity or any time thereafter with interest at seven per cent per annum until paid and agrees to pay all costs and ex-

Petition to Turn Over Cattle

penses paid or incurred in collecting the same and hereby also agrees to hold himself primarily liable upon this note and to bind himself by all the provisions to which the original makers of this note have hereby subscribed, including the right to enter judgment in like manner as if he were himself the original maker thereof, and hereby waives demand of payment and notice of non-payment and protest.

| | | | |
|----------------|--------------|-------|--------|
| Hartman & Son | Jan. 12 1940 | 40.00 | 510.00 |
| Arthur Hartman | Feb. 16 1940 | 40.00 | 470.00 |

And on, to wit, the 7th day of August, A. D. 1940, came the Algonquin State Bank by its attorneys and filed in the Referee's Office of said Court its certain Petition in words and figures following, to wit:

PETITION OF ALGONQUIN STATE BANK TO TURN OVER CERTAIN CATTLE, ETC.

Filed August 7, 1940, with Conciliation Commissioner,
To The Honorable Walter M. Givler, Referee:

Your petitioner, the Algonquin State Bank, a Corporation, respectfully shows and alleges as follows:

1. That petitioner is a Corporation duly organized and existing under the laws of the State of Illinois and authorized to do business in the State of Illinois as a banking corporation with its principal place of business in the Village of Algonquin, McHenry County, Illinois.

2. That on the 24th day of July A. D. 1939, the Algonquin State Bank loaned Henry Anton Pfister, who signed as H. A. Pfister, the sum of Ten Hundred Seventy-

nine (\$1079.00) Dollars in cash, and that to secure said loan the said H. A. Pfister gave the said Algonquin State Bank, a chattel mortgage on personal property described as follows:

Five (5) Guernsey cows, 5 yr. old, wt 1000 lb each
 One (1) swiss cow, 4 yr old, wt 1050 lb
 One (1) Roan cow, 6 yr old, wt. 1100 lb
 One (1) Red cow, 6 yr old, wt 1200 lb
 Ten (10) Holstein cows, 3-6 yr old, wt. 1150 lb each
 Three (3) Holstein cows, 8 yrs old, wt 1100 lb each
 Two (2) Swiss heifers, 1 yr old, wt 500 lb each
 One (1) Holstein bull, 1 yr old, wt 500 lb
 One (1) Swiss bull, 18 mo. old, wt 750 lb
 Three (3) black horses, 12-14 yr old, wt 1500 lb each
 Five (5) mixed colors Brood Sows, wt 200 lb each
 Farm machinery valued at \$2,000.00

Also all crops to be grown in 1939, together with all grass, hay and feed used or to be used in maintaining the said live stock, hogs, the increase or offspring thereof and additions thereto, to follow said livestock.

3. That the said Henry Anton Pfister made monthly payments due under said chattel mortgage, commencing August 24th, 1939, and continuing through June, 1940, leaving a balance due the Algonquin State Bank of Seven Hundred Sixteen (\$716.00) Dollars which was payable on July 24th, 1940. That the Algonquin State Bank never received notice from the said Henry Anton Pfister that he had filed a Petition in Bankruptcy until June, 1940.

4. That in order to secure the aforementioned loan from the Algonquin State Bank, the said Henry Anton Pfister gave the Algonquin State Bank a personal property

statement, a copy of which is hereto attached, which sworn statement did not include a large portion of the indebtedness which the said Henry Anton Pfister owned, and that the said Henry Anton Pfister represented unto the said Algonquin State Bank, that the chattels covered by the chattel mortgage which he executed to the Algonquin State Bank were free and clear of all liens.

5. That the above named debtor on or about the 25th day of April, 1940, filed his Petition in this Court, praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act; that the first hearing was held under said Petition, at which time a proposal to his creditors was duly made in writing by the said debtor; that said proposal was not accepted and thereupon the said debtor filed his Petition herein under sub-Section S of Section 75 and requested that he be adjudicated a bankrupt herein; that thereupon, on motion of said debtor, appraisers were appointed to appraise his personal property and to set off his exemptions.

6. That listed among the assets in said estate were, 3 Black Horses, 4 Yearling Heifers, 20 Dairy Cows, 1 Bull, 5 Brood Sows, 1927 tractor, plow and disc, 1 corn planter, 1 wheat drill, 2 old harrows, 1 walking plow, 1 riding plow, 1 set of work harness, 1 Hay Rake, 1 Hay Loader, 1 Manure Spreader, About 400 Bu of ear corn 6 Tons of soy bean hay, 1 Lot of Shredded Fodder, 1 Lot of Ensilage, 100 Bu of Oats, 80 Bu Barley, 1 Lot of Rye, 1 Lot of Wheat, And that the chattel mortgage of the Algonquin State Bank covered, the following:

(Here are named the live stock listed in paragraph 2 of this petition.)

and that by virtue of the terms of said chattel mortgage, your petitioner has a first lien on the chattels described in said mortgage and is entitled to foreclose thereon, a copy of said mortgage being attached hereto and marked "Exhibit A." That the original chattel mortgage and the original note, which is secured by said chattel mortgage, are now on file in this cause, with the original claim of your petitioner.

7. That since the execution and delivery of said note and chattel mortgage, a copy of which is attached hereto and marked "Exhibit A," the said debtor has, contrary to the terms and conditions of the chattel mortgage Act of this State, sold and disposed of one (1) of the bulls covered in said chattel mortgage and has sold and disposed of at least one (1) of the cows described in said chattel mortgage, which were the property and security of your petitioner; that said sale was made unbeknown to your petitioner and without its consent, contrary to the provisions of the chattel mortgage Act of the State of Illinois.

8. That dairy cattle, as such, are subject to many unforeseen and unpredictable diseases and injuries and can and may be easily spoiled or ruined through careless and improper handling, so as to make them perishable property within the meaning of this Act and that brood sows are subject to many unforeseen and unpredictable diseases and injuries and can and may be easily spoiled or ruined through careless and improper handling, so as

Petition to Turn Over Cattle

to make them perishable property within the meaning of this Act; that horses are subject to many unforeseen and unpredictable diseases and injuries and can and may be easily spoiled or ruined through careless and improper handling, so as to make them perishable property.

9. That the 1939 crops that were covered in said chattel mortgage, the remainder of which consist of ear corn, soy bean hay, shredded fodder, ensilage, oats, barley, rye and Wheat, at the time that the inventory of the petitioner was filed in this proceeding, are all perishable property within the meaning of this Act.

10. That said cattle, horses, brood sows and corn, oats, rye, wheat, ensilage, hay and fodder were all covered by the chattel mortgage held by the Algonquin State Bank and that in the event the Algonquin State Bank feels itself insecure or in the event of default of said mortgage, the Algonquin State Bank, by virtue of the terms of said mortgage are given the right, to take immediate possession of said chattels and sell them; that the lien of the Algonquin State Bank is a superior lien and that by virtue of the terms of said chattel mortgage, the debtor waived any right of exemption in and to said chattels described in said chattel mortgage, a copy of which is attached hereto, marked "Exhibit A"; that if said cattle, horses, brood sows, oats, barley, rye, wheat, ensilage, shredded fodder, soy bean hay and ear corn are allowed to remain in the possession of the said debtor, under said Act, it will create a possible total loss to your petitioner of all security held by it on said cattle, horses and brood sows and the feed described herein will be fed up and

disposed of, in the event that said cattle, horses, brood sows and feed are allowed to remain in the possession of said Henry Anton Pfister, under the terms and conditions of this Act, and that by reason of said delay, the horses and brood sows would be rendered useless for farming purposes and the dairy cattle because of their being subject to diseases and being easily spoiled, would, if allowed to remain in the possession of the said Henry Anton Pfister, under the terms of this Act, be rendered useless for dairy purposes, unsaleable and fit only for slaughter purposes at a considerably reduced value.

11. That your petitioner, in view of the facts aforesaid, namely: the sale of some of the cattle unbeknown to your petitioner and the deception practiced on your petitioner by Henry Anton Pfister at the time he executed the sworn statement, a copy of which is attached hereto, and in view of the perishable character of the said property, feels itself insecure and unsafe as defined in its said chattel mortgage and has and does hereby elect to declare the balance due on the note secured by said chattel mortgage and to take possession of said cattle, horses, brood sows, corn, hay, barley, oats, ensilage, rye, wheat and shredded fodder; that if said order be not entered allowing it to reclaim its said property under the terms of said chattel mortgage, that the said horses, cattle, brood sows, corn, hay, barley, oats, ensilage, rye, wheat, and shredded fodder be sold as perishable property under the terms and conditions of this Act.

Wherefore, your petitioner prays that an Order be entered herein directing said bankrupt to turn over unto

Exhibit A, Chattel Mortgage

your petitioner the following described personal property covered in your petitioner's chattel mortgage:

(Here is named the live stock listed in paragraph 2 of this petition.)

Balance of crops grown in 1939, consisting of corn, hay, barley, oats, ensilage, rye, wheat, and shredded fodder.

Your petitioner further prays that in case he be not allowed to reclaim his property as in the preceding paragraph prayed that then and in that event, an Order be entered herein, directing the sale of each and all of the items of chattel property described in said chattel mortgage and hereinbefore described as perishable property, in accordance with the Statute in such case made and provided, at either private or public sale at the discretion of the Court.

Respectfully submitted,

Algonquin State Bank,
By Lawrence B. Jensen,
Cashier.

(Duly verified.)

"EXHIBIT A."

Doc. No. 465638 Filed July 26th, A. D. 1939, at 9:05 o'clock A. M.

Chattel Mortgage.

Know All Men By These Presents, that the undersigned, H. A. Pfister Prairie View, Illinois, of the County of Lake and State of Illinois (hereinafter referred to as the Mortgagor, whether one or several), in consideration

of the sum of Ten hundred seventy-nine and no/100 dollars (\$1079.00) loaned to said mortgagor by Algonquin State Bank, Algonquin, Ill. hereinafter called the mortgagee, the receipt of which is hereby acknowledged, and which is evidenced by the note of the undersigned for said sum, of even date herewith, due and payable \$33.00 Aug. 24th, 1939 and \$33.00 on the 24th day of each and every month thereafter until fully paid, with a final payment of \$716.00 due July 24th, 1940 to the order of the mortgagee at the office of the Algonquin State Bank, Algonquin, Ill. with interest from date until paid at the rate of .5 per centum per annum, for the purpose of securing the payment of said debt and the note evidencing the same, or any other note or notes given hereafter as a renewal thereof, together with all advances which may hereafter be made, or other liabilities of the mortgagor to the mortgagee, its successors or assigns, the following described livestock, the increase thereof and additions thereto, now in the possession of the undersigned at farm located 1 1/2 miles S. W. of Prairie View, Ill. Township of Vernon County of Lake, State of Illinois, to-wit:

(Here is named the live stock and other chattels listed in paragraph 2 of the petition.)

This mortgage, and each and all of its terms, shall continue until the debt secured hereby is fully paid.

To Have And To Hold all and singular the said chattels unto the Mortgagee, his legal representatives and assigns to his and their sole use forever;

Provided, Nevertheless, if the undersigned shall well and truly pay the note above mentioned or any exten-

sions or renewals thereof, then this mortgage is to be void; otherwise to remain in full force and effect. And provided, also, that it shall be lawful for the undersigned to retain possession of the mortgaged chattels until the undersigned shall made default in the terms and conditions of this mortgage as herein specified.

And it is understood and agreed by the parties hereto that if default shall be made, by the undersigned, in the payment of the above mentioned note, or of any extensions and renewals thereof, according to their tenor, or if the undersigned shall sell or dispose of, or attempt to sell or dispose of the said mortgaged chattels, or any part thereof, or interest therein, or to remove, or to attempt to remove the same from the feed lots above set forth, or shall neglect the care of said live stock, or in cases of the unreasonable depreciation of said mortgaged chattels, or if the Mortgagee shall deem himself insecure, then and in either or any of said events, at the option of the Mortgagee, without notice of said option to any one, it shall be lawful for the Mortgagee to take immediate possession of the mortgaged chattels and for that purpose to pursue the same wherever said chattels may be found and to enter any premises of the undersigned, with or without force or process of law; wherever said chattels may be found, and take possession of, remove, sell and dispose of the same at either public or private sale as Mortgagee may determine. Such sale may be either in the State and County where said mortgaged chattels are found and at such place therein as the Mortgagee may determine or he, at his option, may ship said chattels to any public stockyard selected by him, and there sell the same on the open

market to the person or persons who shall offer the highest price therefor. The Mortgagee shall give the undersigned notice in writing of the time and place of sale, three days prior thereto, by mailing a copy of said notice, postage prepaid, addressed to the last known place of address of the undersigned and by posting a copy of said notice at the place where the mortgaged chattels are located three days prior to said sale and said notices shall be all that is requisite if the mortgaged chattels are sold at private sale; if sold at public sale, then the Mortgagee, in addition, shall post written notice in three public places, in the County where the mortgaged chattels are located for a like period of time. At any sale the holder of the note secured hereby shall have the right to bid upon and purchase the mortgaged chattels without the right of redemption on the part of the undersigned.

Out of the proceeds of sale shall be paid first; the expense and cost of recovering possession of the mortgaged chattels whether by suit or otherwise, including reasonable compensation of any attorney employed by the Mortgagee in said matter, next the reasonable cost and expenses incurred by the Mortgagee in caring for, removing, transporting and selling chattels and then Mortgagee shall apply the remainder to the payment of the note hereby secured or such part thereof as may remain unpaid and the remainder of said proceeds, if any, shall be paid to the undersigned. If said proceeds shall fail to satisfy the said debt, interest, costs and charges the undersigned covenants and agrees to pay the deficiency to the Mortgagee on demand.

For the purpose of obtaining the loan secured hereby, the undersigned covenants, warrants and represents that he is the absolute owner of all the above described live stock and additional mortgaged chattels; that the description, age, marks and brands are as stated; that the said mortgaged chattels are free from any encumbrance and that the same are now in his possession at the places above described and will be removed only to the feed lots above mentioned; that either after payment of the debt hereby secured or with the written consent of the Mortgagee to sell the livestock or any part thereof herein described, he will consign said stock to and sell it only through an agency affiliated with the * * * and in default thereof, the commissions which would have accrued for said sale shall become an addition to the amount due the Mortgagee by the undersigned and shall be secured hereby.

It is further understood and agreed that this mortgage and all of the rights, privileges and powers therein vested in the mortgagee shall inure to the benefit of and may be exercised by any subsequent owner and holder of the note hereby secured and that this mortgage shall be binding upon the personal representatives, successors and assigns of the parties hereto or either of them, and that the benefit of any valuation, appraisalment, stay, exemption and redemption laws are waived by the undersigned.

In Witness Whereof, the undersigned has hereunto set his hand and seal this 24th day of July 1939.

H. A. Pfister (Seal)

Individual Acknowledgment (Duly acknowledged)

Endorsed: "This instrument to be filed but not recorded. Algonquin State Bank, Algonquin, Illinois. L. B. Jensen Cashier."

"EXHIBIT B."

PROPERTY STATEMENT.

To Algonquin State Bank, Algonquin, Ill. 7/24/39.

For the purpose of obtaining credit with you for money which I may now, or hereafter borrow of you, I, H. Pfister, of Prairie View, in the County of Lake in the State of Illinois, do hereby make the following as a Full, Complete and true statement of my present resources and liabilities.

| Resources | Dollars Cts. | Liabilities | Dollars Cts. |
|---|--------------|--|--------------|
| Notes good | | Mortgage on real estate, state encumbrance on each piece—when due—1941 | \$8000. 00 |
| Cash on hand or in bank | | | |
| Other personal property—described it | | | |
| Cattle No. 25 Weight Value | 2200 00 | Chattels | 1079. 00 |
| Horses No. 3 Value | 400. 00 | Mortgage on stock | |
| Sheep No. Value | | Viz: Cattle | |
| Hogs, No. 5 Value | 100. 00 | Horses | |
| Hay Value | 200. 00 | Sheep | |
| Grain Value | 1000. 00 | Hogs | |
| Farming Tools | 2000. 00 | Money borrowed without security. | |
| Real estate, market value. | | For borrowed money—rate of interest paid | |
| Give name of person holding title. | | \$ Due | |
| Myself | | \$ Due | |
| Annual Sales \$ | | \$ | |
| Homestead, at value—state in whose name | 26,000. 00 | Amount owing on judgment | |
| Insurance on property \$15000.00 | | Are you surety on notes or bonds? | |
| | | Confidential & other debts not included above. | |
| | | References: | |
| Total Assets | \$31,900.00 | Total Liabilities of every kind | \$9079.00 |
| Net Assets | 22,821.00 | | |
| Business | | Names of Partners in full | |
| Located at | | | |

Petition to Turn Over Cattle

The above statement, both printed and written, has been carefully read by me and I affirm it to be a full and correct statement of my financial condition at this date and any change that is against me, I will notify you at once.

H. A. Pfister

(Duly verified.)

And on, to wit, the 10th day of August, A. D. 1940, came the Northern Illinois Finance Company by its attorneys and filed in the Conciliation Commissioner's office of said Court its certain Petition to Turn Over Certain Cattle in words and figures following, to wit:

PETITION OF NORTHERN ILLINOIS, ETC., TO TURN OVER CERTAIN CATTLE.

Filed August 10, 1940, with Conciliation Commissioner.

Your petitioner, Northern Illinois Finance Corporation, a Delaware corporation, respectfully alleges:

1. That it is a Delaware corporation doing business in the State of Illinois with its principal office at 112 E. Locust Street, DeKalb, Illinois.

2. That on or about the 3rd day of January, 1940, the debtor, Henry Anton Pfister, under the name and style of H. A. Pfister, entered into a note in the amount of \$1,234.40, with interest thereon at the rate of 7% per annum from maturity until paid, payable to the order of K. M. Snyder in principal payments of sixteen equal monthly installments of \$77.15 each on the 5th day of each month beginning with the 5th day of February, 1940,

until the said principal with interest is paid; that said note was secured by a chattel mortgage of even date therewith upon the following described goods and chattels:

| | |
|---------------------|-------------------|
| 20 cows and 1 bull: | (EX19566-CH59174) |
| 79783 | 79784 |
| H-189 | 79782 |
| 295720 | EV84048 |
| DY38382 | BW20230 |
| 70825 | BO55313 |
| 70824 | V48837 |
| 60442 | BN12098 |
| EO-34787 | 79786 |
| 74711 | 1 Gur. no tag |
| J556742 | 1 Bull |

3. That on said 3rd day of January, 1940, the said K. M. Snyder duly endorsed said note and chattel mortgage without recourse to the Northern Illinois Finance Corporation, DeKalb, Illinois, and on the 8th day of January, 1940, the said chattel mortgage was recorded in the Recorder's Office of Lake County, Illinois as Document No. 472496; that the said debtor has made payments to the petitioner herein under and by virtue of the terms of said note and chattel mortgage and that there now remains due and owing to your petitioner herein from said debtor upon said note and chattel mortgage the sum of \$771.50, together with interest thereon at the rate of 7% per annum from and after May 5, 1941.

4. That the above named debtor, on or about the 25th day of April, 1940, filed his petition in this Court praying that he be afforded an opportunity to affect a

composition or extension of time in which to pay his debts under Section 75 of the Bankruptcy Act; that a first hearing under Sub-sections A to R of said Section 75 was held, at which time a proposal to the creditors of the debtor was duly made in writing by the said debtor; that said proposal was not accepted and thereupon the said debtor filed his petition herein under Sub-section S of said Section 75 and requested that he be adjudicated a bankrupt; that thereupon, on motion of said debtor, appraisers were appointed to appraise his personal property and to set off his exemptions.

5. That listed in the appraisal of the estate of the debtor are 11 dairy cows, ear tag numbers:

| | |
|---------|----------|
| 79783 | H189 |
| 295720 | 70825 |
| 70824 | EO-34787 |
| CH59174 | 79784 |
| 79782 | V48837 |
| BN12098 | |

and 1 bull, ear tag number 79786, all of which are covered and included in the chattel mortgage hereinabove referred to given by said debtor to the petitioner herein; that by virtue of the appraisal so made it is indicated that the said debtor has disposed of the following cows, ear tag numbers:

| | |
|---------|---------|
| DY38382 | 60442 |
| 74711 | J556742 |
| EV84048 | BW20230 |
| BO55313 | |

and 1 Guernsey with no tag and 1 bull, which cows and bull were likewise included in the aforesaid chattel mortgage; that at the first hearing of creditors the said debtor, Henry Anton Pfister, stated under oath that all of the cows and bull contained in the chattel mortgage aforesaid were still upon the premises of the debtor, with the exception of 1 cow which the said debtor had sold and disposed of without authority or consent of the petitioner herein.

6. That dairy cattle as such are subject to many unforeseen and unpredictable maladies and can and may be easily spoiled or ruined through careless and improper handling as to make them perishable property within the meaning of Section 75S of the Bankruptcy Act; that by the acts of the debtor the security of the petitioner herein has already been reduced, depreciated and dissipated; that the appraisal as returned to this Court indicates that if said cattle are allowed to remain in the possession of the said debtor under Sub-section S of Section 75 as aforesaid, that it will create a possible total loss to your petitioner herein of all security held by it on said cattle; that said cattle being allowed to remain in said dairy would, under the terms and conditions of this Act, be rendered entirely useless for dairy purposes, unsalable and fit only for slaughter purposes at a considerably reduced value; that if said cattle remain in the possession of the said debtor under the terms of Section 75S, the security of this petitioner will be dangerously impaired; that said debtor has no right of exemption in and to said cattle aforescribed.

Petition to Turn Over Cattle

7. That your petitioner, in view of the facts as aforesaid, and especially in view of the perishable character of said property, feels itself unsafe and insecure and fears diminution, removal or waste for want of proper care of said property as defined in the chattel mortgage aforesaid, and the petitioner does hereby elect to declare the entire balance due on its said note and desires to re-claim possession of said cattle; that if said order be not entered allowing it to re-claim its said cattle, that then said cattle be sold as perishable property and as insufficient security under the terms and conditions of Section 75S.

8. Wherefore, it is prayed:

(a) That an order be entered herein directing said bankrupt to turn over to your petitioner under the terms of the chattel mortgage hereinbefore described, the following described cattle:

| | |
|--------------------|----------|
| 79783 | E-189 |
| 295720 | 70825 |
| 70824 | EO-34787 |
| (EX-19566-CH59174) | 79784 |
| 79782 | V48837 |
| BN12098 | 79786 |
| 1 Bull | |

(b) That the debtor be ordered to account for the present whereabouts or disposition of the following described cattle:

| | |
|---------|---------------|
| DY38382 | 60442 |
| 74711 | J556742 |
| EV84048 | BW20230 |
| BO55313 | 1 Gur. no tag |

(c) That in case this petitioner be not allowed to re-claim its property under the terms of its chattel mortgage and as set forth in Paragraph (a) of the prayer hereunder, that then and in that event an order be entered herein directing the sale of each and all of said dairy cattle hereinabove described as perishable property in accordance with the Statute in such case made and provided at either public or private sale at the discretion of the Court.

Northern Illinois Finance Corporation,
a Delaware corporation;

By: T. E. Courtney,
Its President.

(Duly verified.)

And on, to wit, the 10th day of August, A. D. 1940, came the Debtor by his attorneys and filed in the office of the Conciliation Commissioner of said Court his certain Petition to Fix Rental in words and figures following, to wit:

PETITION OF FARMER DEBTOR TO FIX RENTAL.

Filed August 10, 1940, with Conciliation Commissioner.

Comes now Henry Anton Pfister, Bankrupt herein, hereinafter called petitioner, and respectfully represents:

1. that he has filed his debtors petition in this court some months ago.
2. that he was not successful in effecting a composition of, or extension of, time with his creditors in which to pay his debts and has filed his amended petition and

has been adjudged a bankrupt under Section 75-S, including subsection s and amendments thereto.

3. That among his assets are certain personal property consisting of livestock and farm implements. The said livestock being chiefly dairy cattle that are being used by your petitioner for the support of himself and family; and said personal property is incumbered by a conditional sales contract.

That the Northern Finance Corporation, a corporation of DeKalb, Illinois, has a lien on certain livestock owned by your petitioner. Said lien being a conditional sales contract in the sum of to wit \$1,100.00.

That the Algonquin State Bank, a corporation of Algonquin, Illinois, has a lien on certain livestock owned by your petitioner. Said lien being a conditional sales contract in the sum of to-wit \$870.00.

That the National Discount Credit Corporation of Waukegan, Illinois, has a lien on a certain Oldsmobile Automobile secured by a conditional sales contract in the sum of to-wit \$258.00.

Your petitioner further states that he is the owner of certain real estate, which is included in his debtor's petition, now on file in this court, and that he is indebted to one Joseph N. Sikes, Trustee of Waukegan, Lake County, Illinois. A note in the sum of to-wit \$8,000.00, said note being secured by a trust deed on your petitioner's said real estate, and that it is necessary for your petitioner to retain the use and possession of said real estate under the order and direction of this court, as is provided by Section 75-S of the National Bankruptcy Act including subsection s and amendments thereto.

4. That the above mentioned livestock and farm implements are necessary for the petitioner's use in farming purposes and to carry on said farm work including his dairy business, all of which goes to make up the estate of your petitioner.

5. That it is for the best interest of your petitioner's estate for him to retain the use and possession of all of his real estate and personal property, incumbered or unencumbered, under the order and direction of this court, so that he may have an opportunity, as is by law in such case made and provided, to rehabilitate himself as a farmer and retain his home, and that all creditors of your petitioner, who now has secured or unsecured claims against your petitioner's estate may file same with this court as the law provides.

6. That at this time no fixed charges has been made by the Conciliation Commissioner for the use of said personal property and said real estate, and that it would be for the best interest of your petitioner's estate for the Conciliation Commissioner to fix an amount to be paid as rent for the use of said personal property and said real estate, and that the rent for same to be fixed by the Conciliation Commissioner should be payable either yearly or semi-yearly, or as the Court may direct. The same to be paid to said Commissioner as is provided in Section 75-S of the National Bankruptcy Act including subsections and amendments thereto, including paragraph one (1) and two (2) of said section. That any payments so made by your petitioner to the Conciliation Commissioner for the use of said property, either real or personal property,

Petition to Fix Rental

more than the cost, taxes and upkeep of said property shall be paid to the property parties at interest, either secured or unsecured creditors, and said net amount of rent so paid is to be applied as part payment on the original debt that your petitioner owes either on personal property or real estate. That your petitioner's moratorium began running on or to-wit the 26th day of April, A. D. 1940, and said first year of the moratorium will expire on or to-wit the 26th day of April, A. D. 1941. All until the further orders of this court.

Wherefore your petitioner prays that the Conciliation Commissioner of Lake County, Illinois, will fix a reasonable amount for him to pay to the said Conciliation Commissioner as rent, either yearly or semi-yearly, or as the Court may direct, for the use of his said personal property and his said real estate, and that any payments made over and above the taxes, costs and upkeep of said property shall apply upon the original debt now due and owing to his secured and unsecured creditors as their interests may appear. That the end of the first year of your petitioner's moratorium will be on or to-wit the 26th day of April, A. D. 1941. All until the further orders of this court.

Henry Anton Pfister.

(Duly verified.)

And on, to wit, the 31st day of July, A. D. 1940, came the appraisers and filed in the Conciliation Commissioner's office of said Court certain Appraisal and Oath in words and figures following, to-wit:

APPRAISEMENT.

Filed July 31, 1940, with Conciliation Commissioner.

Approved August 13, 1940, by Conciliation Commissioner.

Real Estate of said Bankrupt:

Valuation

That part of the Southeast Quarter of Section Twenty (20), Township Forty-three (43) North, Range Eleven (11), East of the Third Principal Meridian, bounded and described as follows, Beginning at a point in the South boundary line of said Section, One (1) Chain West from the Southeast corner of said Section, thence North, parallel to the East line of said Section, twenty-five (25) chains; thence West to the West line of the East half of said Southeast Quarter; thence South, along the West line of said East half, twenty-five (25) chains, to the South boundary line of said Section; thence East, along said South boundary line, to the place of beginning.

Also the following described real estate, to-wit: Beginning at the Southeast corner of the West half of the Southeast quarter of Section Twenty (20), Township Forty-three (43) North, Range Eleven (11), East of the Third Principal Meridian; thence North on said East line, Forty-three (43) chains and Twenty-four (24) links; thence West parallel with Section line Nine (9) chains and Twenty-five (25) Links; thence South, parallel with the East line of the West half of the Southeast Quarter of said Section, Forty-three (43) Chains and Twenty-four (24) Links, to the South Section Line; thence East Nine (9) chains and Twenty-five (25) Links, to the

place of beginning, all in Lake County,
Illinois.

\$16,000.00

The appraisal of the foregoing real estate includes the improvements thereon and is subject to all liens and encumbrances.

Personal Property of said Bankrupt:

| | |
|--------------------------------------|----------|
| 5 beds and bedding | \$ 25.00 |
| 1 cook stove | 5.00 |
| 1 heating stove | 5.00 |
| 1 set of dishes | 5.00 |
| 1 set of kitchen utensils | 5.00 |
| 3 rugs | 15.00 |
| 6 chairs | 5.00 |
| 4 rocking chairs | 5.00 |
| 1 sideboard | 5.00 |
| 1 davenport | 5.00 |
| 1 sewing machine | 5.00 |
| 1 radio | 5.00 |
| 3 dressers | 15.00 |
| 1 set of garden tools | 2.00 |
| 1 black horse | 35.00 |
| 1 black horse | 35.00 |
| 1 black horse | 20.00 |
| 1 yearling heifer, ear tag #32-84788 | 15.00 |
| 1 yearling heifer, ear tag #32-84790 | 15.00 |
| 1 yearling heifer, ear tag #32-84789 | 15.00 |
| 1 yearling heifer, ear tag #32-84791 | 15.00 |
| 1 dairy cow, ear tag #295720 | 65.00 |
| 1 dairy cow, ear tag #CH59174 | 65.00 |
| 1 dairy cow, ear tag #32-84792 | 65.00 |
| 1 dairy cow, ear tag #EO-55313 | 65.00 |
| 1 dairy cow, ear tag #32-74711 | 65.00 |
| 1 dairy cow, ear tag #32-84793 | 65.00 |

Appraisement

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| | |
|--|--------|
| 1 dairy cow, ear tag #32-70825 | 65.00 |
| 1 dairy cow, ear tag #32-79784 | 65.00 |
| 1 dairy cow, ear tag #32-79783 | 65.00 |
| 1 dairy cow, ear tag #32-79782 | 65.00 |
| 1 dairy cow, ear tag #DV-20330 | 65.00 |
| 1 dairy cow, ear tag #H 189 | 65.00 |
| 1 dairy cow, ear tag #32-79785 | 65.00 |
| 1 dairy cow, ear tag #32-70824 | 65.00 |
| 1 dairy cow, ear tag #EO-34787 | 65.00 |
| 1 dairy cow, ear tag #BN-12098 | 65.00 |
| 1 dairy cow, ear tag #P-48005 | 65.00 |
| 1 dairy cow, ear tag #V-48837 | 65.00 |
| 1 bull, ear tag #32-79786 | 100.00 |
| 5 brood sows | 40.00 |
| 15 pigs | 20.00 |
| 130 hens | 50.00 |
| One 1937 four-door Sedan Oldsmobile Automobile | 275.00 |
| 2 farm wagons | 10.00 |
| 1 1927 tractor, plow and disc | 150.00 |
| 1 corn planter, with fertilizer | 35.00 |
| 1 wheat drill | 5.00 |
| 2 old harrows | 5.00 |
| 1 walking plow | 1.00 |
| 1 riding plow | 5.00 |
| 1 set of work harness | 5.00 |
| 1 hay rake | 3.00 |
| 1 hay loader, 1927 | 5.00 |
| 1 manure spreader, 1930 | 10.00 |
| 2 corn plows, 1 mower and corn binder | 50.00 |
| 1 lot of ear corn, about 400 bushels | 150.00 |
| 6 tons of soy bean hay | 30.00 |
| 1 lot of shredded fodder | 10.00 |
| 1 lot of ensilage | 10.00 |
| 100 bushels of oats | 30.00 |

Order Fixing Rental

| | |
|---------------------------------------|-------------|
| 80 bushels of barley..... | 35.00 |
| 1 lot of rye..... | 5.00 |
| 1 lot of wheat..... | 5.00 |
| <hr/> | |
| Total Value of Personal Property..... | \$ 2,471.00 |
| Total Value of Real Estate..... | 16,000.00 |
| <hr/> | |
| Total Value of Property..... | \$18,471.00 |

The foregoing appraisal of said personal property and the value placed thereon is subject to all liens and encumbrances which exist.

(Duly verified.)

And afterwards, to wit, on the 13th day of August, A. D. 1940, being one of the days of the regular August term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter M. Givler, Referee in Bankruptcy, appears the following entry, to wit:

**ORDER FIXING RENTAL AND ADDITIONAL
PAYMENTS.**

Entered August 13, 1940, by Conciliation Commissioner.

This cause coming on to be heard on the amended petition of said debtor filed under the provisions of section 75 of the Bankruptcy Act and on the motion of the creditors, E. C. Hook, Algonquin State Bank, and Northern Illinois Finance Company, for the fixing of a reasonable rental value for the property of said debtor; Henry

Anton Pfister, and for the payment of principal due and owing by said debtor to the secured and unsecured creditors herein as their interest may appear, as provided by the provisions of Section 75 (s) of said Act; and it appearing to the court and the court now finds that said debtor has filed an amended petition herein for relief under said section 75 (s) and said debtor has been duly adjudged a bankrupt under said section 75 (s) and that the value of the debtor's property has been fixed by an appraisal heretofore had, which appraisal has been approved, all as provided by said section 75 (s); and that heretofore the court has duly set aside for the benefit of said debtor his exemptions as provided by said Act and the court, now having considered said amended petition and said motion of said creditors and having heard evidence with reference to the usual, customary rental in the community where said property is located, based upon the rental value, net income and earning capacity of the property, and having considered evidence with reference to the protection of the rights of the creditors and the debtor's ability to pay with a view to his financial rehabilitation, and having heard arguments of counsel and having considered the suggestion of the debtor's counsel that it would be an aid to the rehabilitation of the debtor if payments required be reduced for the first year, increased in the second year, with a further increase for the third year, so that the total payments made will equal the sum determined by this Court as a fair annual amount to be paid, and now being fully advised in the premises, finds that the motion of said creditors for the fixing of said rental and for the payment of principal

Order Fixing Rental

payments upon the amount due the creditors should be granted and the Court now finds that the reasonable rental for said property based upon the usual and customary rental in the community where the property is located, based upon the rental value, net income and earning capacity of the property, would be the sum of \$2,125.00 per year; that it will assist the debtor to pay the sum of \$1,625.00, divided in semi-annual payments the first year, \$2,125 divided into semi-annual payments the second year, and \$2,625.00 divided into semi-annual payments the third year, so that the total rental for the three-year period shall be paid in an amount equivalent to \$2,125.00 per year.

It Is, Therefore, Ordered that the possession of all of the real and personal property of said debtor, as set forth in the appraisal filed herein on July 31, 1940 (except that portion thereof designated and set apart as exempted property of said debtor as provided in the order this day entered approving the appraisers report and setting aside said exemptions), shall remain in the debtor under the supervision and control of the Court, subject to all existing mortgages, liens, pledges or encumbrances, and all such existing mortgages, liens, pledges or encumbrances shall remain in full force and effect and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the payment of the secured creditors as their interests shall appear.

It Is Further Ordered that such debtor shall be permitted to retain possession of such property during a

Order Fixing Rental

75

period of 3 years from April 26, 1940, under the supervision and control of this court, provided that said debtor pay into this court rental for such property \$2,125.00 per year (which sum is hereby fixed as a reasonable rental) in semi-annual instalments as follows:

| | |
|------------------|-----------|
| October 26, 1940 | \$ 812.50 |
| April 26, 1941 | 812.50 |
| October 26, 1941 | 1062.50 |
| April 26, 1942 | 1062.50 |
| October 26, 1942 | 1312.50 |
| April 26, 1943 | 1312.50 |

Said rental shall be used first, for the payment of taxes and upkeep of said debtor's property, and the remainder shall be distributed among the secured and unsecured creditors of the debtor and applied on their claims as may hereafter be ordered by the court; and said debtor be and he is hereby ordered to pay said rental as above set forth. Said debtor be and he is further ordered to pay quarterly in addition to the rental above mentioned on the principal due and owing by said debtor to the secured and unsecured creditors, as filed herein, as their interests may appear, the following sums:

| | |
|------------------|--|
| July 26, 1940 | \$406.25 (which time of payment is extended to Aug. 28, 1940) |
| October 26, 1940 | \$406.25 |
| January 26, 1941 | 406.25 |
| April 26, 1941 | 406.25 |
| July 26, 1941 | 531.25 |
| October 26, 1941 | 531.25 |

Order Fixing Rental

| | |
|------------------|--------|
| January 26, 1942 | 531.25 |
| April 26, 1942 | 531.25 |
| July 26, 1942 | 656.25 |
| October 26, 1942 | 656.25 |
| January 26, 1943 | 656.25 |
| April 26, 1943 | 656.25 |

which principal payments, so required as aforesaid, the Court now finds is consistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation. The Court hereby reserves to itself the right to order sold any unexempt perishable property of the debtor, or any unexempt personal property now reasonably necessary for the farming operations of the debtor and to make such other and further orders as may be proper under section 75 of the Bankruptcy Act.

It Is Further Ordered that all judicial or official proceedings in any court or under the direction of any official against the debtor or any of his property be, and the same are hereby stayed for a period of three years from April 26, 1940, or until the further order of this court and if, however, the debtor at any time fails to comply with the provisions of said Section 75 of said Act, or with the orders of this court for the payment of rental and for the payment of principal due and owing, as above ordered, made pursuant to said section, or is unable to refinance himself within three years, this court shall order the appointment of a trustee and order the property sold or otherwise disposed of, as provided for in said Act; to the entry of which order the said debtor hereby

objects, which objections, having been heard, are now hereby overruled.

Enter this 13th day of August, A. D. 1940.

(signed) Walter M. Givler,
Referee.

ok.

Northern Ill. Finance Co.

by Geo. D. Carbarby

Their atty.

ok. Algonquin State Bank by
Henry C. Cowlin, atty.

ok. E. C. Hook by J. N. Sikes,
Atty.

And afterwards, to wit, on the 7th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter M. Givler, Referee in Bankruptcy, appears the following entry, to wit:

ORDER ON PETITION OF HARTMAN AND SON.

Entered September 7, 1940, by Conciliation Commissioner.

1. This matter coming on this 7th day of September, A. D. 1940, to be heard upon the verified petition of Hartman & Son, this day set for hearing before the undersigned as Referee, and the petitioners, Arthur Hartman and Harvey Hartman, co-partners doing business, as Hartman & Son, being present in open Court by their attorney, Elmer C. Tobin, and the debtor, Henry Anton Pfister, being present in open Court by Robert Coulson,

his attorney, and all other parties hereto being also represented, and the Court, being fully advised in the premises, Finds:

2. That it has full and complete jurisdiction of the parties to and the subject matter in said petition contained; that all parties hereto have had full and complete notice of the filing of said petition by said petitioners and of the hearing to be had thereon on this date, and the said debtor, through his attorney, having stipulated and agreed in open Court that the dairy cattle in said petition mentioned were and are perishable property within the meaning of Section 75, Sub-Section S, paragraph 2 of this Act.

3. That since the filing of said petition by said debtor herein, the said debtor has, according to his own admissions, sold two of the cows claimed by the petitioners, Hartman & Son, under their conditional sales notes filed herein; and has also sold other cattle covered by chattel mortgages held by others of the creditors herein; that said cattle in said petition of Hartman & Son described, on the date said note was given, constituted scant and meager security to said petitioners for the amount evidenced by said note; that said cows are cows of mature or more than mature age, and if allowed to remain in said dairy and with the said debtor under the terms of this Act, the security of the petitioners, Hartman & Son, would be materially reduced and might be, by virtue of the conduct of the debtor aforesaid, completely lost; that said cattle constitute perishable property as stipulated by the debtor herein, and it would be inequitable

or unwarranted not to allow a liquidation of said security as perishable property as in and by said Act provided.

4. That said cattle in said petition and conditional sales note described were not selected by or set off to the above named debtor as exempt property herein and that said debtor made no claim to said property as exempt; that the best interest of said petitioners and secured creditors herein require the sale of said property in said petition described in accordance with paragraph 2 of Sub-Section S of Section 7 of the Bankrupt Act; that William Chandler is a proper and suitable person to make such sale as an officer hereof.

It is Therefore Ordered, Adjudged and Decreed that William Chandler be and he is hereby appointed the officer of this Court to sell the following described property mentioned in the conditional sales notes and petition of said petitioners and attached thereto as Exhibit A, viz.:

Four dairy cows bearing ear tag numbers as follows:

3274711

BN12098

295720

H189

Also one Guernsey cow bearing no ear tag number but being at present in the herd of said debtor and on his farm.

that said sale be made at public auction on a date and hour to be selected by said officer, for cash and at a price equaling at least two-thirds of the appraised value

as placed thereon by the appraisers herein; that said sale be made in accordance with the terms and conditions as laid down by said Sub-Section S of Section 75, and that notice thereof be given by said officer by setting up written or printed notices thereof, giving the time, place and terms of such sale, in at least four of the most public places in Lake County, Illinois, and one at the place where such sale is to be had, at least five days prior to such sale, and that he shall also mail a similar copy of such notice to the petitioners and said debtor at least five days prior to such sale; that such officer herein appointed to conduct said sale make due report of such sale and expense thereon to the undersigned within two weeks thereafter and bring such money so realized from such sale into Court to abide further order thereon.

Entered this 7th day of September, A. D. 1940.

Walter M. Givler,

Referee.

And afterwards, to wit, on the 7th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter M. Givler, Conciliation Commissioner, appears the following entry, to wit:

ORDER ON PETITION OF ALGONQUIN STATE
BANK.

Entered September 7, 1940, by Conciliation Commissioner.

This matter coming to be heard upon the Petition of the Algonquin State Bank and the Court having heard

the evidence and being advised in the premises finds:

1. That the Algonquin State Bank held a chattel mortgage on certain personal property which was the property of Henry Antor Pfister, being described as follows, to-wit:

- Five Guernsey cows, 5 yr. old, wt. 1,000 lb. each
- One (1) Swiss cow, 4 yr. old, wt. 1,050 lb.
- One (1) Roan cow, 6 yr. old, wt. 1,100 lb.
- One (1) Red cow, 6 yr. old, wt. 1,200 lb.
- Ten (10) Holstein cows, 3-6 yr. old, wt. 1,150 lb. each
- Three (3) Holstein cows, 8 yrs. old, wt. 1,100 lb. each
- Two (2) Swiss heifers, 1 yr. old, wt. 500 lb. each
- One (1) Holstein bull, 1 yr. old, wt. 500 lb.
- One (1) Swiss bull, 18 mo. old, wt. 750 lb.
- Three (3) black horses, 12-14 yr. old, wt. 1,500 lb. each
- Five (5) Mixed Colors Brood Sows, wt. 200 lb. each
- Farm machinery valued at \$2,000.00
- Crops grown in 1939.

2. The Court further finds that The Algonquin State Bank has filed a claim in the amount of Seven Hundred Sixteen (\$716.00) Dollars and said claim has been allowed in the amount of Seven Hundred Sixteen (\$716.00) Dollars, and

3. The Court further finds that the personal property described in said Petition should be sold and that fifteen (15) days' notice should be given of said sale and that said sale should be properly advertised and that Wm. Chandler be appointed to act in behalf of this court in conducting said sale and that the money derived from

said sale be retained by this Court and be distributed in accordance with Order of this Court.

Walter M. Givler,
Referee.

And afterwards, to wit, on the 7th day of September, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter M. Givler, Referee in Bankruptcy, appears the following entry, to wit:

ORDER ON PETITION OF NORTHERN ILLINOIS,
ETC.

Entered September 7, 1940, by Conciliation Commissioner.

This cause coming on to be heard this 7th day of September, A. D. 1940, upon the verified petition of the Northern Illinois Finance Corporation, a Delaware corporation, this day set for hearing by the undersigned, as Referee, and the petitioner, Northern Illinois Finance Corporation, a Delaware corporation, being present in open court, by their attorneys, Geo. D. Carbary and Almore H. Teschke, and the debtor, Henry Anton Pfister, being present in open court by Robert Coulson, his attorney, and other parties hereto being also represented, and the Court being fully advised in the premises and having full and complete jurisdiction of the parties to and the subject matter in said petition contained, and all parties having had full and complete notice of the filing of the petition of the petitioner and of the hearing to be had thereon on this date, The Court Doth Find;

1. That on or about the 3rd day of January, 1940, the debtor, Henry Anton Pfister, under the name and style of H. A. Pfister, entered into a note in the amount of \$1,234.40, with interest thereon at the rate of 7% per annum from maturity until paid, payable to the order of K. M. Snyder in principal payments of sixteen equal monthly installments of \$77.15 each on the 5th day of each month beginning with the 5th day of February, 1940, until the said principal with interest is paid; that said note was secured by a chattel mortgage of even date therewith upon the following described goods and chattels:

| | |
|---------------------|-------------------|
| 20 cows and 1 bull: | (EX19566-CH59174) |
| 79783 | 79784 |
| H-189 | 79782 |
| 295720 | EV84048 |
| DY38382 | BW20230 |
| 70825 | BO55313 |
| 70824 | V48837 |
| 60442 | BN12098 |
| EO-34787 | 79786 |
| 74711 | 1 Gur. no tag |
| J556742 | 1 Bull |

2. That on said 3rd day of January, 1940, the said K. M. Snyder duly endorsed said note and chattel mortgage without recourse to the Northern Illinois Finance Corporation, De Kalb, Illinois; and on the 8th day of January, 1940, the said chattel mortgage was recorded in the Recorder's Office of Lake County, Illinois, as Document No. 472496; that the said debtor has made payments to the petitioner herein under and by virtue of the terms of said note and chattel mortgage and that there now remains due and owing to your petitioner herein from said

debtor upon said note and chattel mortgage the sum of \$771.50, together with interest thereon at the rate of 7% per annum from and after May 5, 1941.

3. That the above named debtor, on or about the 25th day of April, 1940, filed his petition in this Court praying that he be afforded an opportunity to affect a composition or extension of time in which to pay his debts under Section 75 of the Bankruptcy Act; that a first hearing under Sub-sections A to R of said Section 75 was held, at which time a proposal to the creditors of the debtor was duly made in writing by the said debtor; that said proposal was not accepted and thereupon the said debtor filed his petition herein under sub-section S of said Section 75 and requested that he be adjudicated a bankrupt; that thereupon, on motion of said debtor, appraisers were appointed to appraise his personal property and to set off his exemptions.

4. That listed in the appraisal of the estate of the debtor are 11 dairy cows, ear tag numbers:

| | |
|---------|---------|
| 79783 | H189 |
| 295720 | 70825 |
| 70824 | EO34787 |
| CH59174 | 79784 |
| 79782 | V48837 |
| BN12098 | |

and 1 bull, ear tag number 79786, all of which are covered and included in the chattel mortgage hereinabove referred to given by said debtor to the petitioner herein; that by virtue of the appraisal so made it is indicated that the

said debtor has disposed of the following cows, ear tag numbers:

DY38382

60442

74711

J556742

EV84048

BW20230

BO55313

and 1 Guernsey with no tag and 1 bull, which cows and bull were likewise included in the aforesaid chattel mortgage; that at the first hearing of creditors the said debtor, Henry Anton Pfister, stated under oath that all of the cows and bull contained in the chattel mortgage aforesaid were still upon the premises of the debtor, with the exception of 1 cow which the said debtor had sold and disposed of without authority or consent of the petitioner, Northern Illinois Finance Corporation.

5. That the debtor, Henry Anton Pfister, by and through his attorney, Robert Coulson, has stipulated and agreed in open court that the dairy cattle in said petition mentioned and contained were and are perishable property within the meaning of Section 75, sub-section S, Paragraph 2 of the Bankruptcy Act; that by the acts of the debtor, the security of the petitioner, Northern Illinois Finance Corporation, has already been reduced, depreciated and dissipated; that the appraisal, as returned to this Court, indicates that if the said cattle are allowed to remain in the possession of the debtor under sub-section S of Section 75 as aforesaid, that it will create a possible total loss to the petitioner of all security held by it on said cattle; that said cattle being allowed to remain in said dairy would, under the terms and conditions

of this Act, be rendered entirely useless for dairy purposes; unsalable and fit only for slaughter purposes at a considerably reduced value, most of said cows already being cows of mature or more than mature age; that if said cattle remain in the possession of the said debtor, the security of the petitioner, Northern Illinois Finance Corporation, will be dangerously impaired.

6. That said cattle in said petition contained were not selected by or set off to the debtor, Henry Anton Pfister, as exempt property herein, and that said debtor made no claim to said property as exempt; that the best interest of the petitioner and secured creditors herein require the sale of said property in said petition described, in accordance with Paragraph 2 of sub-section S of Section 75 of the Bankruptcy Act.

7. Wherefore, It Is Ordered, Adjudged and Decreed:

(a) That the said cattle hereinabove referred to are hereby declared perishable property within the meaning of Section 75, sub-section S, Paragraph 2 of the Bankruptcy Act.

(b) That it is for the best interests of the petitioner, Northern Illinois Finance Corporation, and all parties concerned that the dairy cattle hereinabove described be sold as perishable property in accordance with the provision of Section 75, sub-section S of the Bankruptcy Act.

(c) That William Chandler be and he is hereby appointed the officer of this Court to sell the following described property mentioned in the chattel mortgage and

the petition of the Northern Illinois Finance Corporation,
to-wit:

| | |
|---------------------|-------------------|
| 20 cows and 1 bull: | (EX19566-CH59174) |
| 79783 | 79784 |
| H-189 | 79782 |
| 295720 | EV84048 |
| DY38382 | BW20230 |
| 70825 | BO55313 |
| 70824 | V48837 |
| 60442 | BN12098 |
| EO-34787 | 79786 |
| 74711 | 1 Gur. no tag |
| J556742 | 1 Bull |

That the debtor, Henry Anton Pfister, account for the present whereabouts or disposition of the following numbered cattle which are not accounted for in the appraisal returned to this Court:

| | |
|---------|---------------|
| DY38382 | 60442 |
| 74711 | J556742 |
| EV84048 | BW20230 |
| BO55313 | 1 Gur. no tag |

and that if such cattle as aforesaid have lost their ear tag numbers and have been given new ear tag numbers contained in the debtor's appraisal, that such cattle with their new ear tag numbers be included within the purview and purpose of this order;

That said sale be made at public auction on a date and hour to be selected by said officer for cash and at a price equaling at least two-thirds of the appraised value as placed thereon by the appraisers herein; that said sale be made in accordance with the terms and conditions as

laid down by said sub-section S of Section 75, and that notice thereof be given by said officer by setting up written or printed notices thereof, giving the time, place and terms of such sale in at least four of the most public places in Lake County, Illinois, and one at the place where such sale is to be had, at least five days prior to such sale, and that he shall also mail a similar copy of said notice to the petitioner and said debtor at least five days prior to such sale; that such officer herein appointed to conduct said sale make due report of such sale and expense thereof to the undersigned within two weeks thereafter and bring such monies so realized from such sale into court to abide the further orders of this Court.

(d) It is further ordered, adjudged and decreed that the said debtor may, at the time and in the manner provided for in said Act, redeem said cattle from such sale.

Entered this 7th day of September, A. D. 1940.

Walter M. Givler,
Referee.

And on, to wit, the 20th day of September, A. D. 1940, came the Debtor by his attorneys and filed in the Conciliation Commissioner's office of said Court his certain Petition for Rehearing of Orders of September, A. D. 1940, in words and figures following, to wit:

**PETITION OF FARMER DEBTOR FOR REHEARING OF
ORDERS OF SEPTEMBER 7, 1940.**

Filed September 20, 1940, with Conciliation Commissioner.

To the Honorable Walter M. Givler, Conciliation Commissioner in the above entitled matter.

Said farmer debtor respectfully shows:

1. This matter has been pending by reference from the Honorable William H. Holly, Judge of the United

States District Court for the Northern District of Illinois, Eastern Division, pursuant to the said farmer debtor's amended petition under said Section 75 (s) since July 23, 1940.

2. Said farmer debtor was from the filing of his petition herein on February 28, 1940, represented by J. E. Dazey, attorney at law, of Findlay, Illinois, who obtained the services of Robert E. Coulson of Waukegan, Lake County, Illinois, a young attorney beginning to practice at this time, and who was not at any time authorized to do anything in said cause except as authorized by said Attorney Dazey, that is, to file papers prepared by said Attorney Dazey and mailed to him, and up to September 7, 1940, said Attorney Dazey did not know of any stipulations or agreements in reference to this Cause. Said J. E. Dazey, the said farmer debtor's counsel, became seriously ill on May 21, 1940, with high blood pressure which resulted in a stroke of apoplexy, since which time he has been unable to attend to any case in court and has been able to do only a little office work, and his blood pressure since said stroke has been as high as two hundred thirty-two and on September 18, 1940, was still one hundred ninety-two.

Said farmer debtor attaches hereto the affidavit of said Attorney J. E. Dazey which he makes a part of this petition for rehearing.

When said Attorney Dazey learned on or about September 7th, 1940, that the certain order of August 13, 1940, providing for the fixing of rental, ordering extra payments, staying proceedings and so forth (which is the

subject, of a Petition for Rehearing filed herein on September 16, 1940, and now pending before said Conciliation Commissioner), he as soon as he could do so retained the only counsel he could obtain who has had extensive practice in farmer debtor proceedings, namely, Elmer McClain, Attorney-At-Law, Lima, Ohio, to investigate the docket and file in said Cause in the United States District Court and in the office of said Conciliation Commissioner and to do whatever should be necessary to conserve and protect the rights of said farmer debtor.

3. That thereafter on September 12, 1940, Elmer McClain, counsel for said farmer debtor, came to the office of said Conciliation Commissioner and asked said Conciliation Commissioner for the Conciliation Commissioner's docket and for the Conciliation Commissioner's file pertaining to said cause and copied every docket entry pertaining to said cause and examined and made notes of or copied every paper in said file, taking each paper separately from said file, and carefully read it and there was on said docket no memorandum relating to the reclamation or sale of the property of said farmer debtor except as stated in the following paragraph number 6 of this petition for rehearing and there was in said file no entry of September 7, 1940, ordering the sale of debtor's chattels, namely, certain cows.

4. On September 19, 1940, said farmer debtor learned what he had not known theretofore, namely, that three certain orders had been entered by said Conciliation Commissioner ordering the sale of certain chattel property which is a part of the assets of his estate being administered herein.

5. The appraisal of all of the property of said farmer debtor's estate as approved by said Conciliation Commissioner is as follows:

Real estate consisting of a gross acreage of 37 1/2 acres of which approximately 5 acres is subject to drainage easement \$16,000.00

Household and garden utensils \$ 107.00

3 Horses 90.00

4 Yearling heifers 60.00

18 Dairy Cows 1170.00

1 Bull 100.00

20 Hogs 60.00

130 Poultry 50.00

1 Automobile 275.00

Farming equipment 274.00

Total of household goods, garden utensils, livestock, automobile and farming equipment \$2186.00 2,186.00

of which the following personal property was so set off as exempt:

Household and garden utensils \$107.00

Equity in automobile 44.00

Farm equipment 249.00

Total personal property exemption \$400.00

Thus leaving, after setting of said exemptions, the following personal property in said estate subject to the provisions of Section 75:

3 Horses

4 Yearling heifers

18 Dairy cows

1 Bull

20 Hogs

130 Poultry

1 Automobile (of which \$44 is exempt out of a total valuation of \$275).

Farming equipment to the value of \$25. (\$274 total value, \$249 exempt.)

Total value of personal property not exempt

\$1,786.00

Of said personal property the only revenue producing portion is 18 dairy cows while fresh (each cow being out of production and a dead expense for an average period of two to four months each year); 20 hogs which can produce nothing except sale value once, and 130 poultry; said dairy cows being practically the sole income producing chattels.

Said real estate is not capable of producing sufficient feed forage and bedding for said livestock and therefore in itself produces no direct revenue, or if there be any, it is more than offset by the necessity of purchasing feed, forage, bedding, medicines, and veterinary services for said livestock.

6. The docket of said Conciliation Commissioner in said matter contains among others the following memoranda:

"August 7, 1940. Petition of Hartman and Son for reclamation of personal property filed.

"August 7, 1940. Petition of Algonquin State Bank for reclamation of personal property filed.

"August 8, 1940. Petition of National Discount Credit Corporation for reclamation of personal property filed.

"August 10, 1940. Petition of Northern Illinois Finance Company for reclamation of personal property filed.

"August 13, 1940. * * * hearing on reclamation petition and stipulations by debtor and each of the following claimants: Hartman and Son; Northern Illinois Finance Company; and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph number (2) subsection (a) of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the reclamation petitions is not at this time claimed by bankrupt as exempt property. Hearing on all further motions and petitions continued to August 30, 1940, at 10 a. m. DST."

"August 30, 1940. Hearing on all above matters continued to September 7, 10 A. M. DST."

"September 7, 1940. Further hearing had and petition of Algonquin State Bank, Hartman and Son, and Northern Illinois Finance Company filed praying for order authorizing sale of certain cattle contained in conditional sales contract and chattel mortgage as perishable property, prayer of petitions granted as per order (Dft)."

7. Your petitioner further avers that neither he nor his counsel admitted or consented or stipulated in any manner as stated or inferred by said memorandum quoted above from the said Conciliation Commissioner's docket under date of August 13, 1940, that any of his personal

property described in the petition or elsewhere is perishable within the meaning of any portion of Section 75 of the Bankruptcy Act.

8. Your petitioner respectfully says that he has at all times desired and still desires to present evidence concerning the subject of said orders of September 7, 1940, and to have the law relating thereto presented to the Conciliation Commissioner so that he may have due process of law; and that to this day he has not had an opportunity to have either such evidence or the law relating thereto presented.

9. Your petitioner attaches to this petition for rehearing the affidavit of said Robert E. Coulson which he makes a part hereof.

Wherefore said farmer debtor respectfully prays that Your Honor as such Conciliation Commissioner rehear the said matter in so far as it relates to the said orders of September 7, 1940, and that he be given an opportunity to present his evidence relating thereto.

(The affidavit of Attorney J. E. Dazey referred to in paragraph numbered 2 of the foregoing Petition for Rehearing appears at R. 34 at the end of the Petition for Emergency Restraining Order which begins at R. 27).

AFFIDAVIT OF ROBERT E. COULSON.

Robert E. Coulson, being duly sworn, says that he is an attorney at law admitted to practice in the Courts of the State of Illinois; that he was requested by Attorney J. E. Dazey of Findlay, Illinois, to act for said Attorney Dazey in the Matter of Henry Anton Pfister as a farmer

debtor in proceedings under Section 75 of the Bankruptcy Act, being Case Number 72557 pending before the Honorable Walter M. Givler, Conciliation Commissioner, by filing papers prepared by said Attorney Dazey; he further says that he at no time intended to represent said farmer debtor in any manner involving the substantive law and that in particular he did not stipulate or agree that any cows in the estate of said farmer debtor were perishable; that when present in the office of said Conciliation Commissioner with attorneys for certain creditors he was asked whether he would admit that the cows in said estate were perishable and he answered that if they meant to ask him whether the cows would die he would answer yes.

Robert E. Coulson.

(Duly verified.)

And on, to wit, the 23rd day of September, A. D. 1940, came the Debtor by his attorneys and filed in the Conciliation Commissioner's office of said Court his certain Amendment to Petition for Rehearing in words and figures following, to wit:

**AMENDMENT TO FOREGOING PETITION BY FARMER
DEBTOR FOR REHEARING OF ORDERS OF
SEPTEMBER 7, 1940.**

Henry Anton Pfister hereby amends his Petition for Rehearing of the orders of September 7, 1940, by adding thereto the following:

10. Referring to paragraph numbered 4 in said Petition for Rehearing filed September 20, 1940, your petitioner says that he did not see said orders of September

7, 1940, until one of them was shown by Your Honor as said conciliation commissioner to the Honorable Judge Holly, Judge of the District Court, in the Court Room of the United States District Court in Chicago on September 19, 1940, and he did not see a copy of said order until September 19, 1940, nor know its contents.

11. Your petitioner says that he did not, as stated in the order of September 7, 1940, since the filing of his petition under Section 75 (a) to (r) in the District Court on February 28, 1940, sell two of the cows claimed by Hartman and Son under their conditional sales contract. He says that one of said cows became infected with Mastitis, a dangerous and infectious disease of dairy cows, and that her usefulness as a dairy cow became thereby so impaired that to save as much of her value as possible, he sold her for beef, according to the best practice of dairying. He holds the proceeds therefrom of \$57.81 subject to the order of this court.

12. The appraisalment herein is by statute still subject to objections, exceptions and appeals, and said farmer debtor has not, as stated in said orders of September 7, 1940, waived, and does not waive, his right to claim any or all of said cows as exempt and will not finally claim his exemptions until said appraisalment has become final.

13. Said farmer debtor says that said cows are not, as stated in said orders of September 7, 1940, of such mature, or more than mature age, as to be or to become by reason of such maturity, perishable property.

Henry Anton Pfister

(Duly verified)

And on, to wit, the 26th day of September, A. D. 1940, came the Algonquin State Bank by its attorneys and filed in the Conciliation Commissioner's office of said Court its certain Answer to Petition for Rehearing in words and figures following, to wit:

**ANSWER OF ALGONQUIN STATE BANK, HARTMAN
AND SON, AND NORTHERN ILLINOIS, ETC.,
TO PETITION FOR REHEARING OF ORDERS
OF SEPTEMBER 7, 1940.**

Filed September 26, 1940, with Conciliation Commissioner.

To the Honorable Walter M. Givler, Conciliation Commissioner in the above entitled matter:

Algonquin State Bank, an Illinois banking corporation, by Henry L. Cowlin, its attorney, Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman & Son, by Elmer C. Tobin, their attorney, and the Northern Illinois Finance Corporation, a Delaware corporation, by Carbary & Teschke, its attorneys, for answer to the petition for rehearing heretofore filed in the above entitled cause, say:

1. The undersigned admit the allegations in paragraph 1 of the petition for rehearing contained.

2. They neither admit nor deny that J. E. Dazey represented said farmer debtor on the filing of the petition herein and are inadvised as to who obtained the services of Robert E. Coulson; that at the first hearing had before such conciliation commissioner, the said Robert E. Coulson appeared on behalf of and with said debtor farmer and was, to all purposes and intents, so far as these

creditors could ascertain, duly authorized and empowered to act as the attorney for said farmer debtor and continues to so act as such attorney; that said Robert E. Coulson, in a certain proceedings for an emergency restraining order, signed his certain affidavit therein, in and by which said affidavit, the said Robert E. Coulson asserted under oath that he was on said date counsel of record for the said Henry Anton Pfister, farmer debtor; that whatever arrangement existed between the said Coulson and the said Dazey, referred to in said petition for rehearing, is entirely unknown to these creditors, and they aver and so state the fact to be that any private understanding between the said Dazey and the said Coulson was and is immaterial to the issues advanced by said petition; they deny that said Coulson was a young lawyer just beginning practice. On the contrary, aver that said Coulson, as they are advised and believe, was born in the year 1912; was admitted to practice in the State of Illinois in 1936; that he is a graduate of Dartmouth University and Chicago University with L. L. B. and J. D. degrees; that he is now and has been for four^o (4) years last past engaged in the general practice of his profession in the city of Waukegan, Illinois; that they are inadvised as to the condition of health of the said J. E. Dazey from the 21st day of May, A. D. 1940, to this date, and call for strict proof thereof; that such condition of said counsel is unfortunate but is immaterial to the issues hereof, and aver that there was ample time between the date of said alleged illness (May 21, 1940) and the date of the entry of the order in question (September 7, 1940) for the farmer

debtor to have employed other counsel to represent him or said Dazey to employ other counsel to represent said debtor on said hearings; that the matter of selection of attorneys is a privilege of the farmer debtor; that the undersigned have no voice or authority therein and should not on this hearing be charged with the inability or inactivity of counsel for said farmer debtor; that during all of the proceedings before said conciliation commissioner, the said Coulson was present, was advised of each and every step as matters progressed, and appeared cognizant of the import and intent of every petition and the effect of every order entered thereon; that he was granted every extension and courtesy in the conduct of said matters before said conciliation commissioner; that said conciliation commissioner on numerous occasions requested the presence of said farmer debtor and the said Dazey at the various hearings had before him on the various orders and petitions entered and filed in said cause, each and all of which requests were refused by said farmer debtor farmer and the said Dazey, as his attorney.

3. That leave to file said petitions for reclamation and sale of said property was granted by said conciliation commissioner on the 27th day of July, A. D. 1940; that such petitions were to be filed by the undersigned on or before the 10th day of August, A. D. 1940, and were set for hearing on the 13th day of August, A. D. 1940; that said Coulson was present at the time leave was granted to file said petitions and on the date set for hearing on said petitions; that the said J. E. Dazey never appeared at any hearing before said conciliation commissioner for

and on behalf of said farmer debtor, though his presence was requested by the conciliation commissioner; and his said presence was particularly requested at the hearing of August 30th, A. D. 1940, at which time, by order of the conciliation commissioner at the request of said Coulson, said hearing was continued to the 7th day of September, A. D. 1940, on which said date the said Dazey did not appear for said farmer debtor; but in lieu and in place thereof, one U. G. Ward, attorney, from Shelbyville, Illinois, as the undersigned are advised, was present and acting for and on behalf of said Dazey and said farmer debtor; that each and every opportunity was afforded the said farmer debtor or the said Dazey to present the interests of said farmer debtor before said conciliation commissioner; that sufficient time elapsed subsequent to the 7th of September, A. D. 1940, when the order complained of was entered, to appeal therefrom as by rule of Court and statute provided, but no such appeal was ever taken; that they are inadvised as to the qualifications and the extent of the practice of the present attorney, one Elmer McClain of Lima, Ohio, and are inadvised as to his qualifications to represent said farmer debtor and call for strict proof thereof.

4. The undersigned deny the allegations as to the alleged search in paragraph 3 of said petition contained, and are inadvised as to the ability of the said McClain to locate the order in question, but aver that said order was signed, filed, entered and placed of record by said conciliation commissioner on the 7th day of September, A. D. 1940, in the presence of said farmer debtor, Robert

E. Coulson and U. G. Ward, the two attorneys representing said Pfister at said hearing; that said order was discussed prior to the entry thereof in the presence of said farmer debtor and his said attorneys, Robert E. Coulson and U. G. Ward. The name of the auctioneer to conduct said sale was discussed in his presence and was inserted therein after discussion with said farmer debtor by the said conciliation commissioner.

5. Defendants deny the allegations in paragraph 4 of said petition contained and aver that said farmer debtor is the former president of the Pure Milk Association and was present on the date and at the entry of the order of September 7, A. D. 1940, heard the discussion thereon, was advised as to the contents thereof, and with such experience and knowledge reflected by such official capacity in such Association, should have known the effect thereof.

6. They are not fully advised as to the appraisal figures in paragraph 5 of said petition contained but aver that the conciliation commissioner's records reflect the true condition of said appraisal and selections; they deny that the 18 dairy cattle are the only revenue-producing portion of said personal property; they deny that said real estate produces insufficient feed, forage and bedding as in said paragraph 5 of said petition contained.

7. They neither admit nor deny the allegations set forth in paragraph 6 of said petition for rehearing contained, but call for strict proof thereof.

8. The undersigned deny each and every allegation

in paragraph 7 of said petition contained, and aver that the docket entry of the conciliation commissioner on the 13th day of August, A. D. 1940, indicates and shows that a stipulation was on said date entered into concerning the perishability of the property described in said petitions, by and between the creditors therein named and the said farmer debtor by and through his attorney; that such stipulation so shown by said conciliation commissioner's docket and the petition for rehearing filed herein, was made to said conciliation commissioner and spread upon his docket in the presence of said farmer debtor's attorney and the attorneys for the undersigned creditors in open Court.

9. They deny the allegations in paragraph 8 of said petition contained. On the contrary, aver that said petitions for reclaimer and sale of said personal property as perishable were set for hearing before said commissioner on a day certain, to-wit: August 13, 1940; that said farmer debtor, through his said attorneys, had knowledge thereof and full and ample opportunity, if they so desired, to present such evidence as he might have had on the hearing of said petitions; that at said hearing on said petitions, the undersigned appeared with their witnesses to make proof of the matters and things in said petitions contained, had their witness sworn and were ready to start with the proof of the matters and things in said petitions alleged, when counsel for said farmer debtor, without solicitation from any of the undersigned or the conciliation commissioner or any other party in interest, offered and did stipulate and agree that the property in said petitions de-

scribed were perishable within the meaning of Section 75 of the Bankruptcy Act and were not selected by said farmer debtor as exempt.

10. The undersigned deny the allegations in paragraph 9 of said petition contained and call for strict proof of the matters therein alleged, and herewith attach and make part of this petition the affidavits of Henry L. Cowlin, Elmer C. Tobin and Almore H. Teschke, attorneys for the Algonquin State Bank, Hartman & Son and the Northern Illinois Finance Corporation, with reference to the matters and things covered by the alleged affidavit of the said Robert E. Coulson.

11. As to paragraph 10 set up in the amendment to petition for rehearing aforesaid, the undersigned say:

They neither admit nor deny that said petitioner did not see said order of September 7th until same was presented before Judge Holly in the District Court on the 19th of September, A. D. 1940, but aver that the only reason that said farmer debtor did not see said order, if such be the case, was for the reason that he did not exercise his privilege, if he so desired, to inspect said order prior to and at the time same was entered by the conciliation commissioner; that said order was discussed at length in his presence before said conciliation commissioner, both with him and with his attorneys prior to and at the time of the signing and entry thereof.

12. Your petitioners move that the contents of paragraph 11 as set forth in said amendment to petition for rehearing be stricken as an attempt to impeach the testimony given by said farmer debtor before Your Honor,

the conciliation commissioner in this cause, for the reason that said farmer debtor did, on his examination held before Your Honor, the conciliation commissioner herein, state that he had sold two of the cows delivered him by Hartman and Sons under the conditional sales notes attached to and made part of their claims filed herein, and also described in the conditional sales notes attached to and made part of the petition for reclaimer and sale herein; they neither admit nor deny that said farmer debtor has said sum of \$57.81 as therein suggested and aver that said farmer debtor has further sums also subject to order of this Court which he has not accounted for herein.

13. They deny the allegations in paragraph 12 of the amendment to the petition for rehearing contained and state as a matter of law that the said farmer debtor has no exemptions in said cattle, having waived such exemptions at the time of the signing of the chattel mortgage to the Northern Illinois Finance Corporation and the Algonquin State Bank, and never having had title to said cows obtained from Hartman & Son under the conditional sales notes now on file herein.

14. They deny the allegations in paragraph 13 of said amendment to the petition for rehearing contained and call for strict proof thereof.

And now the undersigned, having fully answered said petition for rehearing and amendment thereto, say:

That said debtor farmer was represented of record in this case by two attorneys and two attorneys only, namely: J. E. Dazey of Findlay, Illinois, and Robert

E. Coulson, of Waukegan, Illinois; that the said J. E. Dazey is not a member of this Bar residing in this District, and that the said Robert E. Coulson was the only attorney of record for said farmer debtor residing in this district; that notices of all proceedings had in the matter of the petition of said farmer debtor were given the said Robert E. Coulson, who is the only attorney of record and member of the Bar of this Court and residing in this district; that under rule 1, sub-section (e) of the rules of the United States District Court for the Northern District of Illinois, Eastern Division, it is provided:

"In all cases filed in or removed to this Court, all parties not appearing pro se must be represented of record by a member of the bar of this court residing in this district. Service of notice upon such attorney shall constitute service upon all other counsel appearing of record for such party."

that notice having been thus given said farmer debtor as by rules of Court provided, no further notice was necessary, and that under the rules of said Court, service of notice upon the said Robert E. Coulson or notice to the said Robert E. Coulson constituted service upon the said J. E. Dazey.

The undersigned deny that said farmer debtor is entitled to the relief or any part thereof in said petition for rehearing contained, and ask that same be dismissed forthwith, at debtor's costs.

Algonquin State Bank,

an Illinois banking corporation,

Hartman And Son

Northern Illinois Finance Corporation,

a Delaware corporation.

(Duly Verified.)

**AFFIDAVIT OF HENRY L. COWLIN, ELMER C. TOBIN
AND ALMORE H. TESCHKE.**

Henry L. Cowlin, being first duly sworn upon his oath, deposes and says that he is an attorney of record in the above entitled cause for the Algonquin State Bank; and Elmer C. Tobin, also being first duly sworn upon his oath, deposes and says that he is attorney of record in the above matter for Hartman & Son; and Almore H. Teschke, being first duly sworn upon his oath, deposes and says that he is one of the attorneys of record for the Northern Illinois Finance Company, and each of said affiants, each for themselves depose and say that they were each present before Walter M. Givler, the conciliation commissioner to whom the above entitled cause has been referred, on the 13th day of August, A. D. 1940, when the stipulation reflected in his docket as of that date was made.

These affiants further state that such stipulation was made by said farmer debtor through his said attorney of his own free will and volition; that no request was made upon said farmer debtor or his said attorney to enter into any stipulation whatsoever with reference to the facts contained in the petitions for reclamation and sale of the personal property therein described; that each of these affiant appeared before said commissioner on said date with their witnesses prepared to make proof of the facts contained in their several petitions; that several of the witnesses were sworn to testify and were about to be interrogated by the affiant, Elmer C. Tobin, on behalf of Hartman & Son, and that Harvey Hartman, one of the copartners was on the stand for interrogation purposes; and that before the said Tobin could proceed

with the interrogation, the said farmer debtor, through his said attorney, present at said hearing, voluntarily offered to make the stipulation reflected in said conciliation commissioner's docket; that thereupon said witness was withdrawn from the stand by the said Tobin, and he and the attorney for said farmer debtor dictated the stipulation into the record of the said conciliation commissioner in open Court in the presence of said conciliation commissioner and each of the affiants herein.

These affiants further state that said stipulation was joined in by the affiant, Almore H. Teschke, on behalf of the Northern Illinois Finance Corporation, and Henry L. Cowlin, on behalf of the Algonquin State Bank.

And further affiants saith not.

Henry L. Cowlin,
Elmer C. Tobin,
Elmore H. Teschke.

(Duly Verified.)

And on, to wit, the 26th day of September, A. D. 1940, came the debtor by his attorneys and filed in the Clerk's office of said Court his certain Reply to Answer to Petition for Rehearing in words and figures following, to wit:

REPLY OF FARMER DEBTOR TO ANSWER TO PETITION FOR REHEARING OF ORDERS OF
SEPTEMBER 7, 1940.

Filed As of September 26, 1940, with Conciliation Commissioner.

By stipulation of the answering secured creditors and by order of the conciliation commissioner made and

issued at the hearing on September 26, 1940, the said farmer debtor herewith presents for filing the Affidavit of U. G. Ward in reply to the Answer of Algonquin State Bank, Hartman and Son, and Northern Illinois Finance Corporation. Said reply is to be filed as of September 26, 1940.

AFFIDAVIT OF U. G. WARD.

U. G. Ward being first duly sworn upon his oath, deposes and says that he was present on September 7th, 1940, in a hearing before the Conciliation Commissioner in the above entitled matter in the city of Waukegan, Lake County, Illinois.

That the affiant is a regularly practising attorney at Shelbyville, Shelby County, Illinois where he has been engaged in the practice of law for more than twenty-five years last past. That, no order was presented to this affiant upon said hearing or at the close thereof, but that it was stated, as this affiant verily believes, that a general order should be prepared by someone or all of the attorneys representing the petitioner, and that a copy thereof, at the request of this affiant, was to be furnished to Robert E. Coulson, one of the attorneys for the debtor who was present at said hearing, but that this affiant has never seen any such order and was not advised whether one is in fact filed, or a copy thereof furnished to the said Robert E. Coulson.

Further your affiant sayeth not.

U. G. Ward,

(Duly Verified.)

Henry Anton Phister,
Farmer Debtor.

And on, to wit, the 30th day of September, A. D. 1940, came the Referee and filed in the office of said Court his certain Opinion and Decision in words and figures following, to wit:

REFEREE'S OPINION AND DECISION ON PETITION
FOR REHEARING OF ORDERS OF
SEPTEMBER 7, 1940.

Entered September 30, 1940, by Conciliation Commissioner.

Statement of Facts.

The debtor filed his petition and schedules on March 1, 1940, for a composition or extension under Section 75 of the National Bankruptcy Act including Sub-section 6. Debtor failed to obtain the acceptance of a majority in number and amount of all creditors whose claims were affected by said composition, and on May 1, 1940, filed an amended petition to comply with Section 75-S of the Act.

Debtor's counsel were J. E. Dazey of Findlay, Illinois, and Attorney Robert E. Coulson of Waukegan. The latter attended all of the hearings had in the matter before the Commissioner; Mr. Dazey never appeared at any time or at any hearing.

At the first meeting of creditors (June 29, 1940) debtor was present in person, sworn and examined, he was represented by Mr. Coulson. He submitted his proposal in writing which was rejected by a majority in number and amount of all creditors whose claims were affected. His testimony at the hearing disclosed that he was selling black dirt from his farm and was ordered

to refrain from so doing in the future. It was further ordered also that the proceeds from his sale of milk, eggs and poultry be impounded and held by him subject to the order of the Commissioner. No moneys were ever turned in to the Commissioner by debtor at any time.

Because of the nature of the proposal submitted, debtor was unable to obtain the acceptance of a majority in number and amount of all creditors whose claims were affected by said composition. He therefore amended his said petition pursuant to the provisions of Section 75-S of the Act.

Appraisers were appointed to appraise the real and personal property of debtor, in accordance with the terms of the Act, and on July 31, 1940, said appraisers filed their report setting forth a list of all of the real and personal property and their valuation of each item.

On August 2, 1940, the Commissioner filed a report of debtor's exempted property to be set apart and retained by him.

On August 10, 1940, Debtor petitioned the Court to fix the amount of rent to be paid for the use of the encumbered real and personal property. This was done.

At the hearing on August 13, 1940, it was stipulated and agreed that the security of the Algonquin State Bank, Hartman and Son and the Northern Illinois Finance Company, all of whom held conditional sales contracts or chattel mortgages, was to be considered as perishable property under the terms of Section 75-S of the Act, and on September 7, 1940, in compliance with the petition filed, the Commissioner entered an order authorizing the sale of same by William Chandler, auctioneer.

At the hearing of September 7, 1940, the following persons were present:

Robert E. Coulson, Waukegan, Illinois, representing debtor.

U. G. Ward, Shelbyville, Illinois, representing debtor.

Elmer C. Tobin, Elgin, Illinois, representing Hartman & Son.

Carbary & Teschke, Elgin, Illinois representing Northern Illinois Finance Corporation.

Henry L. Cowlin, Crystal Lake, Illinois, representing the Algonquin State Bank.

Joseph N. Sikes and John Mooradian, Waukegan, Illinois, representing E. C. Hook and Emil Geest.

Prior to that date, the Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son (hereinafter called the Three Creditors), offered witnesses to prove that cattle of the ages covered by their conditional sales contracts and chattel mortgages were perishable within the meaning of the Act. After the witnesses were sworn but before any evidence was given by them, debtor's counsel stated that such testimony was not necessary, that he would stipulate that the security of said Three Creditors was perishable within the meaning of the Act. This oral stipulation was entered on the Commissioner's docket under date of August 13, 1940.

On September 20, 1940, through an entirely different counsel, one Elmer McClain of Lima, Ohio, the debtor filed a petition for a rehearing of the order of September 7, 1940, which order authorized the sale of the debtor's cattle as perishable property.

Discussion.

The petition for rehearing of the order of September 7, 1940, in substance, primarily raises one major issue, namely, that the debtor has not been properly represented in this matter by his counsel, and has not had his day in court.

The record, however, shows the following:

1. The first meeting of creditors was held on June 28, 1940. Debtor's counsel, Robert E. Coulson, was present at that time. Coulson, at this hearing, submitted in writing debtor's proposal which was rejected by the creditors in the presence of Debtor, and the latter was ordered to submit a counter-proposal.

2. At the second meeting of creditors, July 9, 1940, Coulson was again present, the debtor was not. Coulson stated that the debtor had no further proposal to submit to the creditors. A motion by one of the creditors to dismiss the petition as to Sections A to R was heard and allowed, and debtor was given 15 days to file an amended petition as provided by Section S of the Act.

3. On July 23, 1940, the debtor's amended petition, under Section 75-S was filed by Robert E. Coulson, debtor's attorney.

4. On July 25, 1940, Coulson moved for the appointment of appraisers, and further moved that debtor's exemptions be set off to him. The motion was granted and the appraisers were appointed by agreement of all parties present.

5. The appraisers filed their report on July 31, 1940, which was approved, and the Commissioner set off to debtor his exempted property as provided by the Act.

6. At the hearing of August 13, 1940, the debtor, through his attorney Coulson, joined the creditors in a motion asking that a reasonable rental for the real and personal property be fixed. A rental was fixed and all proceedings stayed for a three-year period as provided by the Act. It was at this hearing that the stipulation as to the perishableness of the security of the Three Creditors was entered into.

7. At the hearing of September 7, 1940, debtor was present in person, and was represented by not only Coulson but one U. G. Ward, an attorney of Shelbyville, Illinois. At that hearing a full opportunity was given debtor to indicate his position before the entry of the order of sale. No offer of proof was made on the question of the sale of the cattle. No request for time to put in further or additional proof was asked for at that hearing. Prepared orders were then submitted by said Three Creditors (in the presence of debtor and his two counsel), authorizing the sale of the personal property, which orders were then signed in their presence. It is obvious that one of the reasons for the filing of the petitions for sale by said Three Creditors was that their combined claims as filed aggregate \$2,243.80, whereas the appraised value of all of debtor's cattle was \$1,330.00.

Any court must necessarily require that the business of its office be conducted through attorneys, so that an

orderly procedure may be followed. An examination of the various hearings in this cause indicates clearly that at all times and at all hearings, the debtor was adequately and fully represented. Debtor at all times had full and ample opportunity to present his evidence or any defense he might desire, but for reasons best known to himself and his counsel, did not do so. The order of September 7, 1940, was signed in the presence of the debtor and his two counsel, and was accessible to them at all times, and notwithstanding such opportunity, no objections were made and no appeals taken within the time provided by law.

Of all the various hearings held in this cause, debtor only attended two. The Commissioner on numerous occasions requested the presence of the debtor and J. E. Dazey so that more might be accomplished at each hearing.

If debtor feels that he has not been properly or adequately represented, it is not because of the number or ability of his counsel. It is conceivable that debtor might feel the same way about any counsel he might subsequently engage, and might again petition for a rehearing on that ground. Certainly no purpose would be served by again trying the case with new or different counsel.

Much is made in the rehearing petition of the illness of J. E. Dazey. This condition of Dazey's health was first called to the Commissioner's attention by this petition. At no time during the proceedings was a continuance or extension of time requested because of it. It appears from the petition alone that Mr. Dazey suffered a stroke of apoplexy on May 21, 1940, or more than a month before

the first meeting of creditors. If he did not feel able to carry on his work, he had an abundance of time to engage other counsel.

It appears also, from the rehearing petition only (Paragraph 4) that said debtor was not informed of the order of September 7, 1940. Debtor attended this hearing personally, and was represented by his counsel Robert E. Coulson and U. G. Ward. In passing, it must be said of the debtor that he is an unusually intelligent man, having at one-time been President of the Pure Milk Association of the Chicago area. He must certainly be held accountable for what actually transpires in his presence.

The Commissioner feels that inasmuch as a stipulation was entered into relative to the perishableness of the security of the Three Creditors, that no decision on this point need be made. Suffice it to say that debtor himself alleges in his rehearing petition that "he did not, as stated in the order of September 7, 1940, since the filing of his petition under Section 75 (a) to (r) in the District Court on February 28, 1940, sell two of the cows claimed by Hartman & Son under their conditional sales contract. He says that one of said cows became infected with, Mastitis, a dangerous and infectious disease of dairy cows, and that her usefulness as a dairy cow became thereby so impaired, that to save as much of her value as possible, he sold her for beef, according to the best practice of dairying." This would appear to be an admission of their perishableness.

Conclusion.

From the facts above stated, it is the decision of the Conciliation Commissioner, that the petition for rehearing

of the order of September 7, 1940, should be and the same is hereby denied.

Enter:

Walter M. Givler,

Conciliation Commissioner.

September 30, 1940.

And on, to wit, the 9th day of October, A. D. 1940, came the Debtor by his attorneys and filed in the Clerk's office of said Court his certain Petition for Review of Three Orders in words and figures following, to wit:

**PETITION FOR REVIEW OF THREE ORDERS DATED
SEPTEMBER 7, 1940, WHICH BECAME
FINAL SEPTEMBER 30, 1940.**

Your petitioner is the farmer debtor herein and as such was a party to the following certain farmer debtor proceedings pending before Honorable Walter M. Givler as the conciliation commissioner in charge thereof, namely:

1. The petition of Hartman and Son for reclamation of personal property filed August 7, 1940, with said conciliation commissioner as shown by the docket of said conciliation commissioner.
2. The petition of Algonquin State Bank for reclamation of personal property filed August 7, 1940, with said conciliation commissioner as shown by the docket of said conciliation commissioner.
3. The petition of Northern Illinois Finance Corporation for reclamation of personal property filed August 10, 1940, with said conciliation commissioner as shown by the docket of said conciliation commissioner.

Upon the hearing thereof certain final orders were made by the said conciliation commissioner as follows:

"In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Farmer Debtor. Gen. No. 72557. Proceedings Under Section 75 Sub-Section S.

1. This matter coming on this 7th day of September, A. D. 1940, to be heard upon the verified petition of Hartman & Son, this day set for hearing before the undersigned as Referee, and the petitioners, Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman & Son, being present in open Court by their attorney, Elmer C. Tobin, and the debtor, Henry Anton Pfister, being present in open Court by Robert Coulson, his attorney, and all other parties hereto being also represented, and the Court, being fully advised in the premises, Finds:

2. That it has full and complete jurisdiction of the parties to and the subject matter in said petition contained; that all parties hereto have had full and complete notice of the filing of said petition by said petitioners and of the hearing to be had thereon on this date, and the said debtor, through his attorney, having stipulated and agreed in open Court that the dairy cattle in said petition mentioned were and are perishable property within the meaning of Section 75, Sub-Section (s), paragraph 2 of this Act.

3: That since the filing of said petition by said debtor herein, the said debtor has, according to his own admissions, sold two of the cows claimed by the peti-

tioners; Hartman & Son, under their conditional sales notes filed herein, and has also sold other cattle covered by chattel mortgages held by others of the creditors herein; that said cattle in said petition of Hartman & Son described, on the date said note was given, constituted scant and meager security to said petitioners for the amount evidenced by said note; that said cows are cows of mature or more than mature age, and if allowed to remain in said dairy and with the said debtor under the terms of this Act, the security of the petitioners, Hartman & Son, would be materially reduced and might be, by virtue of the conduct of the debtor aforesaid, completely lost; that said cattle constitute perishable property as
(end of page 1)

stipulated by the debtor herein, and it would be inequitable or unwarranted not to allow a liquidation of said security as perishable property as in and by said Act provided.

4. That said cattle in said petition and conditional sales note described were not selected by or set off to the above named debtor as exempt property herein and that said debtor made no claim to said property as exempt; that the best interest of said petitioners and secured creditors herein require the sale of said property in said petition described in accordance with paragraph 2 of subsection S of Section 75 of the Bankrupt Act; that William Chandler is a proper and suitable person to make such sale as an officer hereof.

It Is Therefore Ordered, Adjudged and Decreed That William Chandler be and he is hereby appointed the of-

ficer of this Court to sell the following described property mentioned in the conditional sales notes and petition of said petitioners and attached thereto as Exhibit Z, viz.:

Four dairy cows bearing ear tag numbers as follows:

3274711

BN12098

295720

H189

Also one Guernsey cow bearing no ear tag number but being at present in the herd of said debtor and on his farm.

that said sale be made at public auction on a date and hour to be selected by said officer, for cash and at a price equaling at least two-thirds of the appraised value as placed thereon by the appraisers herein; that said sale be made in accordance with the terms and conditions as laid down by said Sub-Section S of Section 75, and that notice thereof be given by said officer by setting up written or printed notices thereof, giving the time, place and terms of such sale, in at least four of the most public places in Lake County, Illinois, and one at the place where such sale is to be had, at least five days prior to such sale, and that he shall also mail a similar copy of such notice to the petitioners and said debtor at least five days prior to such sale; that such officer herein appointed to conduct said sale make due report of such sale and expense thereon to the undersigned within two weeks

(end of page 2)

thereafter and bring such money so realized from such sale into Court to abide further order thereon.

Entered this 7th day of September, A. D. 1940.

Walter M. Givler,
Referee."

(2)

"In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Debtor. No. 72557. Proceedings for Composition or Extension.

Order.

This matter coming to be heard upon the Petition of the Algonquin State Bank and the Court having heard the evidence and being advised in the premises finds:

1. That the Algonquin State Bank held a chattel mortgage on certain personal property which was the property of Henry Anton Pfister, being described as follows, to-wit:

Five Guernsey cows, 5 yr. old, wt. 1000 lb. each

One (1) Swiss cow, 4 yr. old, wt. 1050 lb.

One (1) Roan cow, 6 yr. old, wt. 1100 lb.

One (1) Red cow, 6 yr. old, wt. 1200 lb.

Ten (10) Holstein cows, 5-6 yr. old, wt. 1150 lb. each

Three (3) Holstein cows, 8 yrs. old, wt. 1100 lb. each

Two (2) Swiss heifers, 1 yr. old, wt. 500 lb. each

One (1) Holstein bull, 1 yr. old, wt. 500 lb.

One (1) Swiss bull, 18 mo. old, wt. 750 lb.

Three (3) black horses, 12-14 yr. old, wt. 1500 lb. each

Five (5) Mixed Colors Brood Sows, wt. 200 lb. each

Farm Machinery valued at \$2000.00

(end of page 1)

Crops grown in 1939.

2. The Court further finds that The Algonquin State Bank has filed a claim in the amount of Seven Hundred Sixteen (\$716.00) dollars and said claim has been allowed in the amount of Seven Hundred Sixteen (\$716.00) Dollars, and

3. The Court further finds that the personal property described in said Petition should be sold and that fifteen (15) days' notice should be given of said sale and that said sale should be properly advertised and that William Chandler be appointed to act in behalf of this Court in conducting said sale and that the money derived from said sale be retained by this Court and be distributed in accordance with Order of this Court.

Walter M. Givler,
Referee."

(3)

"In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Debtor. Gen. No. 72557.

Order.

This cause coming on to be heard this 7 day of September, A. D. 1940, upon the verified petition of the Northern Illinois Finance Corporation, a Delaware corporation, this day set for hearing by the undersigned, as Referee, and the petitioner, Northern Illinois Finance Corporation, A Delaware corporation, being present in open court, by their attorneys, Geo. D. Carbary and Almore H. Teschke, and the debtor, Henry Anton Pfister, being present in open court by Robert Coulson, his attorney, and other parties hereto being also represented,

and the Court being fully advised in the premises and having full and complete jurisdiction of the parties to and the subject matter in said petition contained, and all parties having had full and complete notice of the filing of the petition of the petitioner and of the hearing to be had thereon on this date, The Court Doth Find:

1. That on or about the 3rd day of January, 1940, the debtor, Henry Anton Pfister, under the name and style of H. A. Pfister, entered into a note in the amount of \$1,234.40, with interest thereon at the rate of 7% per annum from maturity until paid, payable to the order of K. M. Snyder in principal payments of sixteen equal monthly installments of \$77.15 each on the 5th day of each month beginning with the 5th day of February, 1940, until the said principal with interest is paid; that said note was secured by a chattel mortgage of even date therewith upon the following described goods and chattels:

(end of page 1)

20 cows and 1 bull:

(EX19566-Ch59174)

79783

79784

H-189

79782

295720

EV84048

DY38382

BW20230

70825

BO55313

70824

V48837

60442

BN12098

EO-34787

79786

74711

1 Gur. no tag

J556742

1 Bull

2. That on said 3rd day of January, 1940, the said K. M. Snyder duly endorsed said note and chattel mortgage without recourse to the Northern Illinois Finance Corporation, DeKalb, Illinois, and on the 8th day of January, 1940, the said chattel mortgage was recorded in the Recorder's Office of Lake County, Illinois, as Document No. 472496; that the said debtor has made payments to the petitioner herein under and by virtue of the terms of said note and chattel mortgage and that there now remains due and owing to your petitioner herein from said debtor upon said note and chattel mortgage the sum of \$771.50, together with interest thereon at the rate of 7% per annum from and after May 5, 1941.

3. That the above named debtor, on or about the 25th day of April, 1940, filed his petition in this court praying that he be afforded an opportunity to effect a composition or extension of time in which to pay his debts under Section 75 of the Bankruptcy Act; that a first hearing under Sub-sections A to R of said Section 75 was held, at which time a proposal to the creditors of the debtor was duly made in writing by the said debtor; that said proposal was not accepted and thereupon the said debtor filed his petition herein under sub-section S of said Section 75 and requested that he be adjudicated a bankrupt; that thereupon, on motion of said debtor, appraisers were appointed to appraise his personal property and to set off his exemptions.

4. That listed in the appraisal of the estate of the debtor are 11 dairy cows, ear tag numbers:

79783

H189

295720

70825

70824
Ch59174
79782
BN12098

EO-34787
79784
V48837

(End of page 2).

and 1 bull, ear tag number 79786, all of which are covered and included in the chattel mortgage hereinabove referred to and given by said debtor to the petitioner herein; that by virtue of the appraisal so made it is indicated that the said debtor has disposed of the following cows, ear tag numbers:

DY38382
74711
EV84048
BQ55313

60442
J556742
BW20230

and 1 Guernsey with no tag and 1 bull, which cows and bull were likewise included in the aforesaid chattel mortgage; that at the first hearing of creditors the said debtor, Henry Anton Pfister, stated under oath that all of the cows and bull contained in the chattel mortgage aforesaid were still upon the premises of the debtor, with the exception of 1 cow which the said debtor had sold and disposed of without authority or consent of the petitioner, Northern Illinois Finance Corporation.

5. That the debtor, Henry Anton Pfister, by and through his attorney, Robert Coulson, has stipulated and agreed in open court that the dairy cattle in said petition mentioned and contained were and are perishable property within the meaning of Section 75, subsection S, paragraph 2 of the Bankruptcy Act; that by the acts of

the debtor, the security of the petitioner, Northern Illinois Finance Corporation, has already been reduced, depreciated and dissipated; that the appraisal, as returned to this court, indicates that if the said cattle are allowed to remain in the possession of the debtor under sub-section S of Section 75 as aforesaid, that it will create a possible total loss to the petitioner of all security held by it on said cattle; that said cattle being allowed to remain in said dairy would under the terms and conditions of this Act, be rendered entirely useless for dairy purposes unsalable and fit only for slaughter purposes at a considerably reduced value, most of said cows already being cows of mature or more than mature age; that if said cattle remain in the possession of the said debtor, the security of the petitioner, Northern Illinois Finance Corporation, will be dangerously impaired.

(end of page 3)

6. That said cattle in said petition contained were not selected by or set off to the debtor, Henry Anton Pfister, as exempt property herein, and that said debtor made no claim to said property as exempt; that the best interest of the petitioner and secured creditors herein require the sale of said property in said petition described, in accordance with Paragraph 2 of sub-section S of Section 75, of the Bankruptcy Act.

7. Wherefore, It Is Ordered, Adjudged and Decreed:

(a) That the said cattle hereinabove referred to are hereby declared perishable property within the meaning

of Section 75, sub-section S, Paragraph 2 of the Bankruptcy Act.

(b) That it is for the best interests of the petitioner, Northern Illinois Finance Corporation, and all parties concerned that the dairy cattle hereinabove described be sold as perishable property in accordance with the provision of Section 75, sub-section S of the Bankruptcy Act.

(c) That William Chandler be and he is hereby appointed the officer of this Court to sell the following described property mentioned in the chattel mortgage and the petition of the Northern Illinois Finance Corporation, to-wit:

| | |
|---------------------|-------------------|
| 20 cows and 1 bull: | (EX19566-CH59174) |
| 79783 | 79784 |
| H-189 | 79782 |
| 295720 | EV84048 |
| DY38382 | BW20230 |
| 70825 | BO55313 |
| 70824 | V48837 |
| 60442 | BN12098 |
| EO-34787 | 79786 |
| 74711 | 1 Gur. no tag |
| J556742 | 1 Bull |

That the debtor, Henry Anton Pfister, account for the present whereabouts or disposition of the following numbered cattle which are not accounted for in the appraisal returned to this Court:

| | |
|---------|---------|
| DY38382 | 60442 |
| 74711 | J556742 |

EV84048

BW20230

BO55313

1 Gur. no tag

and that if such cattle as aforesaid have lost their ear tag numbers and have been given new ear tag numbers contained in the debtor's appraisal, that such cattle with their new tag numbers be included within the purview and purpose of this order;

That said sale be made at public auction on a date and hour to be selected by said officer for cash and at a price equaling at least two-thirds of the appraised value as placed thereon by the appraisers herein; that said sale be made in accordance with the terms and conditions as laid down by said subsection S of Section 75, and that notice thereof be given by said officer by setting up written or printed notices thereof, giving the time, place and terms of such sale in at least four of the most public places in Lake County, Illinois, and one at the place where such sale is to be had, at least five days prior to such sale, and that he shall also mail a similar copy of said notice to the petitioner and said debtor at least five days prior to such sale; that such officer herein appointed to conduct said sale make due report of such sale and expense thereof to the undersigned within two weeks thereafter and bring such monies so realized from such sale into court to abide the further orders of this Court.

Entered this 7 day of September, A. D. 1940.

Walter M. Givler,
Referee."

Your petitioner duly filed his petition and his amended petition seeking a rehearing of said final orders to which said petition and amended petition the said Hartman and Son, said Algonquin State Bank, and said Northern Illinois Finance Corporation filed their common answer and to which said farmer debtor filed his reply. Said application for rehearing and the pleadings thereto were heard by said conciliation commissioner on September 26, 1940, and on September 30, 1940, said conciliation commissioner rendered and entered his opinion and decision thereon denied said application for rehearing. Whereby said orders of September 7, 1940, became final on September 30, 1940.

Said orders are erroneous in the following respects, namely:

1. In finding and holding that the dairy cattle of the farmer debtor were or are perishable property under Section 75 of the Bankruptcy Act for the relief of farmer debtors.

2. In that they were issued without submission of evidence prior thereto.

3. In that said orders were not submitted to counsel for said farmer debtor or to him for examination before entry thereof.

4. Said farmer debtor being a farmer and not familiar in any respect with legal procedure or substantive law pertaining to said proceedings and matters he was without legal representation as a result of the sudden and

unforeseen serious illness and incapacity of his sole counsel who was retained by him, namely J. E. Dazey, an attorney at law, and who before and during the pendency of said matters suffered an attack of apoplexy with high blood pressure of 232 which remained at 192 on September 18, 1940. Without the authorization of said farmer debtor certain statements were claimed to have been made by one Robert E. Coulson who was instructed by said Attorney Dazey only to file papers, which statements have been held to have been prejudicial to said farmer debtor and were held to warrant the finding and holding that said farmer debtor's cattle were perishable property:

5. By said unfortunate and unforeseen circumstances said farmer debtor has not had due process of law in said proceedings.

6. Said farmer debtor has been unable to present either evidence of facts or legal authorities or arguments in said matters whereby he could maintain his rights under Section 75 of the Bankruptcy Act under which said proceedings were and are pending.

Wherefore petitioner prays that said order be reviewed and reversed and for such order as may be just and right and that he be restored to all things he has lost by reason of said errors.

(Duly verified.)

And on, to wit, the 15th day of October, A. D. 1940, came the Referee and filed in the Clerk's office of said Court his certain Certificate of Referee in words and figures following, to wit:

**CERTIFICATE OF CONCILIATION COMMISSIONER ON
PETITION TO REVIEW THREE ORDERS OF
SEPTEMBER 7, 1940.**

Filed October 15, 1940, in District Court.

Now comes Walter M. Givler, duly appointed, qualified and acting Referee in Bankruptcy in the matter of the above cause, and duly certifies to the Judges of said District Court of the United States the following:

(1) That said farmer debtor Henry Anton Pfister filed with the undersigned on October 9, 1940, an instrument entitled a petition for review of three orders dated September 7, 1940, and the order of September 30, 1940, which petition, so filed, is attached hereto and made a part of this certificate.

(2) That no petition for review was filed by said farmer debtor of the orders dated September 7, 1940, within the ten days, as provided by Section 39, Clause 10-c, of the Bankruptcy Act. However, on September 20, 1940, said farmer debtor filed with the undersigned his petition for rehearing of said orders entered on September 7, 1940, and thereafter, on September 23, 1940, filed his amendment to said petition for rehearing of said orders of September 7, 1940, which petition for rehearing and amendment thereto are attached hereto and made a part hereof. That thereafter, on September 26, 1940, an answer to said petition for rehearing was duly filed by the following creditors: Algonquin State Bank, Arthur Hartman and Harvey Hartman, doing business as Hartman and Son, and Northern Illinois Finance Corporation, which answer, so filed, is attached hereto and made a part hereof. There was filed to said answer

on said September 26, 1940, by said farmer debtor his reply. Said reply, so filed, is attached hereto and made a part hereof.

(3) That on said 26th day of September, 1940, said petition for rehearing and the answer thereto and the reply to said answer were fully heard and considered in open court by the undersigned and duly continued for decision to September 30, 1940, and on said last mentioned date the undersigned denied said petition for rehearing, all as per written opinion and decision of the undersigned and the order of the undersigned entered and filed herein on said 30th day of September, 1940, which opinion and order are attached hereto and made a part hereof.

(4) The questions presented may be stated as follows:

On the petition of three creditors, namely, Northern Illinois Finance Corporation, who filed its petition on August 10, 1940, Arthur Hartman and Harvey Hartman, doing business as Hartman & Son, who filed their petition on August 7, 1940, and Algonquin State Bank, who filed its petition on August 7, 1940, held certain liens against certain personal property of said farmer debtor consisting of cows and asked for the sale of said cows as perishable property, within the meaning of Section 75, sub-section "S," paragraph 2, of the Bankruptcy Act. That after stipulation was made that such dairy cattle were perishable property within the meaning of said Act and upon a hearing had on September 7, 1940, three orders were entered directing the sale of said dairy cattle. Said original petitions, so filed, and the orders entered

on September 7, 1940, are attached hereto and made a part of this certificate. That thereafter, as already stated, no petition for review of said orders of September 7, 1940, was filed within ten (10) days, but on September 20, 1940, a petition for rehearing was filed by said farmer debtor, which petition for rehearing was amended on September 23, 1940. After answer filed as above stated, the principal question raised by said petition for rehearing was whether or not the said farmer debtor had been properly represented in this matter by his counsel and, after hearing on September 26, 1940, as to such matters, the undersigned, by his order on September 30, 1940, denied said petition for rehearing of said orders and rendered and filed his opinion, which is attached hereto, and thereafter said farmer debtor, on October 9, 1940, filed his petition for review as above stated and the undersigned hereby certifies to the Court the foregoing for such decision and order as it may deem proper.

Respectfully certified as aforesaid,

Walter M. Givler, .

Referee as aforesaid.

And on, to wit, the 17th day of October, A. D. 1940, came the Algonquin State Bank by its attorneys and filed in the Clerk's office of said Court its certain Special Appearance in words and figures following, to wit:

SPECIAL APPEARANCE OF ALGONQUIN STATE BANK, NORTHERN ILLINOIS, ETC., AND HARTMAN AND SON, AND MOTION TO DISMISS PETITION TO REVIEW ORDERS OF SEPTEMBER 7, 1940.

Filed October 17, 1940, in District Court.

Now comes Algonquin State Bank, an Illinois banking corporation, by Henry L. Cowlin, its attorney; Northern Illinois Finance Corporation, a Delaware corporation,

by Carbury & Teschke, its attorneys; Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman & Son, by Elmer C. Tobin, their attorney, and as to the portion of the petition for review of the three orders dated September 7, A. D. 1940, ask that said petition be dismissed for the reason that this Court has no jurisdiction to entertain such part of said petition, and as grounds therefor, say:

That said orders were in accordance with the allegations in said petition entered before the Honorable Walter M. Givler, Conciliation Commissioner and Referee, to whom this case was referred, on the 7th day of September, A. D. 1940; that said orders were entered in open Court in the presence of said bankrupt and in the presence of his attorneys of record, Robert E. Coulson and U. G. Ward; that no exception or objection was made thereto at the entry thereof, nor was any petition for review of said orders filed with said Referee or Conciliation Commissioner within the time and in accordance with the rules of Court in such case made and provided, by virtue whereof said orders became final within the time prescribed by said rules, and are not reviewable by this Court under the above mentioned petition.

Wherefore, the undersigned pray that the above petition for review as same pertains to said orders of September 7, A. D. 1940, be dismissed at farmer debtor's costs.

Algonquin State Bank,
an Illinois banking corporation,
Northern Illinois Finance Corporation,
a Delaware corporation.

(Duly verified.) Hartman and Son.

And on, to wit, the 17th day of October, A. D. 1940, came the Algonquin State Bank by its attorneys and filed in the Clerk's office of said Court its certain Answer to Petition for Review in words and figures following, to wit:

ANSWER TO THE PETITION FOR REVIEW OF THE THREE ORDERS OF SEPTEMBER 7, 1940, SO FAR AS SAME APPLIES TO THE ORDER OF SEPTEMBER 30, 1940.

Now comes Algonquin State Bank, an Illinois banking corporation, by Henry L. Cowlin, its attorney; Northern Illinois Finance Corporation, a Delaware corporation, by Carbary & Teschke, its attorneys; Arthur Hartman and Harvey Hartman, co-partners doing business as Hartman & Son, by Elmer C. Tobin, their attorney, and for answer to the petition for review of the three orders of September 7, A. D. 1940, so far as same applies to the order of September 30, A. D. 1940, say:

1. They admit the allegations in paragraphs 1 and 2 of said petition contained.

2. They admit the first paragraph of paragraph 3 of said petition contained, and say as to the alleged copy of the various orders contained on pages 2, 3, 4, 5 and 6, that they assume said orders have been correctly set forth therein and aver that if same are a correct copy of the orders now on file with said Conciliation Commissioner, they are admitted in the form as therein set forth.

3. As to the last paragraph on page 6 of said petition contained, they admit that a petition for rehearing was filed before said Walter M. Givler, Referee, but aver that said petition was not filed within the time pro-

vided by law and rule of Court and was filed subsequent to the time allowed for a review of such order. They admit that a hearing was had on said petition on or about the date in said petition for review mentioned. They admit that said conciliation commissioner rendered his opinion and decision thereon, but aver that the alleged order attached to said petition for review is not the full and complete order of said conciliation commissioner but that same must be supplemented in accordance with the reference therein contained by the opinion and decision of such Referee, a copy of which is hereto attached and marked Exhibit A. They deny that said order of September 7, A. D. 1940, became final on the 30th day of September, A. D. 1940, and on the contrary aver that said order became final when no petition for review of said order was filed with said Referee and Conciliation Commissioner within the time prescribed by statute and rule of Court in such case made and provided.

4. They deny that said order of September 30, A. D. 1940, is erroneous in the manner and form as in said petition for review set forth, and as to sub-paragraph 1 of paragraph 3, they deny the allegation therein contained.

5. As to sub-paragraph 2 of said paragraph 3, they say that the undersigned creditors were present in open Court on the date set for the hearing on the petition upon which said orders were predicated, and had with them at such time witnesses to make proof of the facts in said petition alleged, had said witnesses sworn and were about to submit such evidence when farmer debtor,

through his counsel; Robert E. Coulson, waived the submission of such evidence, and said farmer debtor, having so waived the production of said evidence when witnesses were in open Court ready to make such proof, should not now be heard to complain that no evidence had been introduced prior to the entry of said orders.

6. As to sub-paragraph 3 of said paragraph 3, the undersigned creditors say that said farmer debtor was present in person and by his counsel, Robert E. Coulson and U. G. Ward, at the time of the entry of said orders, entered into the discussion thereof and commented upon the entry of said orders at such time; that said orders were entered in their presence and they had ample opportunity, if they so desired, to examine said orders in full prior to or at the time of the entry thereof.

7. As to sub-paragraph 4 of said paragraph 3, they say that said farmer debtor is a man of unusual intelligence, having been for many years a director and treasurer of the Pure Milk Association and for some years prior to his filing of his petition herein, having been the chief executive and president of said Pure Milk Association, an association dealing with thousands of farmers and millions of dollars per month, and having executed said several offices with dispatch and correctly cannot be imposed upon this Court as the ordinary run of farmer; that during such connection with said Pure Milk Association, he had contact with an acquaintance with many of the reputable and leading members of the Bar of this District. He was a man capable of employing and selecting outstanding counsel; that if with all his qualifications, he selected a man physically unable to

handle his matters in this proceeding, that was a matter of his own choosing; and the undersigned creditors cannot be charged with the results of his selection; that the said J. E. Dazey, alleged in paragraph 4 as being his attorney, was according to certain affidavits on file herein, afflicted with the alleged malady on the 12th day of May, A. D. 1940, more than one month prior to the first meeting of creditors herein; that if said Dazey's condition was such that he was unable to attend to the interests of his said client during the course of this proceeding, it was the duty of the said Dazey to withdraw as attorney for such farmer debtor so that other counsel could have been employed, or to have hired other counsel to take care of the interest of the farmer debtor herein; but that such inability or laxity or negligence on behalf of said Dazey cannot reflect upon or be pleaded against the undersigned creditors herein; that if said farmer debtor has any complaint in that regard, such complaint should be lodged in the State courts as a matter of malpractice against the said Dazey rather than being raised as an issue in this proceeding.

8. The undersigned say that they are inadvised as to the nature or extent of the employment of Robert E. Coulson as attorney of record for said farmer debtor, but aver and so state the fact to be that any alleged understanding existing between the said Coulson, the said Dazey or the said farmer debtor, is immaterial to this proceeding; that the said Robert E. Coulson is a duly licensed and practicing attorney, duly admitted, as the undersigned are advised, to practice in the Courts of the State of Illinois and in this Court; and having

been so admitted, the undersigned have a right to assume that he has the qualifications therefor; that the said Robert E. Coulson was the only resident attorney of this District representing said farmer debtor; that all notices of all proceedings were served upon the said Robert E. Coulson in accordance with the rules of this Court, and that such notice having been served on the said Robert E. Coulson, constitutes notice on the said J. E. Dazey and on the farmer debtor herein of all matters and things transpiring in these proceedings; that the said J. E. Dazey had notice of the first meeting of creditors called herein, and that all hearings subsequent to such first hearing were continuations from said first hearing; that said Coulson, resident attorney of record for said farmer debtor, was present at the first meeting of creditors herein and attended each and every adjournment thereof to and including the hearing of September 7, A. D. 1940, all of which will more fully appear by reference to the Referee's opinion and decision on petition for rehearing of orders of September 7, A. D. 1940, filed herein and hereto attached and made part of this answer and marked Exhibit A.

9. As to sub-paragraph 5 of said paragraph 3, the undersigned deny each and every allegation thereof.

10. As to sub-paragraph 6 of said paragraph 3, the undersigned say that if said farmer debtor has been unable to present either evidence of facts or legal authorities or arguments in said matter, that such inability has been of his own choosing; that all opportunity has been afforded him to present, at any and all hearings herein, all evidence

of facts and all legal authorities or arguments which he may have had.

11. As to sub-paragraph 7 of said paragraph 3, they deny each and every allegation therein contained.

Wherefore, the undersigned pray that said petition for review of the order of September 30, A. D. 1940, be dismissed at farmer debtor's costs.

Northern Illinois Finance Corporation,
a Delaware corporation,
Hartman & Son,
a copartnership.

Algonquin State Bank,
Illinois banking corporation.

(Duly Verified.)

And on, to wit, the 16th day of September, A. D. 1940, came the Debtor by his attorneys and filed in the Conciliation Commissioner's office of said Court his certain petition for rehearing in words and figures following, to wit:

PETITION OF FARMER DEBTOR FOR REHEARING OF
ORDER OF AUGUST 13, 1940.

Filed September 16, 1940, with Conciliation Commissioner.

To the Honorable Walter M. Givler, Conciliation Commissioner in the above entitled matter.

Said farmer debtor respectfully shows:

1. This matter has been pending by reference from the Honorable William H. Holly, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to the said farmer debtor's

amended petition under said Section 75 (s) since July 23, 1940.

2. On August 13, 1940, an order was entered pursuant to said reference which provides that said farmer debtor shall retain possession of his property (other than his exemptions) for a period of three (3) years from April 26, 1940.

3. Said order further provides for rental payments during said three years of \$2,125.00 per year payable in semi-annual installments of \$812.50 the first year, \$1,062.50 the second year, and \$1,312.50 the third year; the first installment to be paid on October 26, 1940, being a total of \$6,375.00 to be paid as rental for three years.

4. Said order further provides for certain payments to be made quarterly, in addition to said rental, in installments of \$406.25 quarterly the first year (being a total of \$1,625.00 the first year); of \$531.25 the second year (being a total of \$2,125.00 the second year); and of \$656.25 the third year (being a total of \$2,625.00 the third year), or a total for the three years of \$6,375.00 in addition to total rental payments of \$6,375.00 during the same period which is a grand total of all rental and additional payments of \$12,750.00 for the three years, being an average annual payment of \$4,250.00 per year for each of the said three years.

5. The conciliation commissioner's docket in this said matter contains under the dates of August 13, 1940, August 30, 1940, September 3, 1940, and September 7, 1940, the following entries:

"August 13, 1940. On motion of claimants present, all claims in file as of this date allowed for their respective amounts as filed (Dft). Leave given Hartman and Son to substitute copies of original notes; motion by E. C. Hook: Algonquin State Bank and Northern Illinois Finance Company that the rent of the farm and personal property be set at the sum of \$1,625.00 for the first year, \$2,125.00 for the second year and \$2,625.00 for the third year, payable in semi-annual installments, the first payment to be due and payable October 28, 1940. In addition debtor is to pay \$1,625.00 the first year, on the principal amount of both secured and unsecured claims (as their interests may appear), in quarterly installments; \$2,125.00 the second year in quarterly installments; and \$2,625.00 the third year in quarterly installments; the payments of the first quarterly installment of 1940 is hereby extended to August 28, 1940: Hearing on motion; motion allowed as per order (Dft.). Objection by debtor, hearing thereon and objection overruled. Motion by E. C. Hook and Emil Geest that the buildings be insured for fire and windstorm to the full insurable value, the insurance to be secured by Joseph N. Sikes in standard stock insurance companies and that he be reimbursed out of the first rent received in proportion to their respective interests. Hearing on reclamation petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph number 2, subsection (s) of Section 75 of the Bankruptcy Act; it is further stipulated that the property

described in the reclamation petition is not at this time claimed by bankrupt as exempt property. Hearing on all further motions and petitions continued to August 30, 1940, at 10 a. m. DST.

August 13, 1940. Order approving appraisers' report filed.

August 13, 1940. Order setting aside debtor's exemptions filed.

August 30, 1940. Hearing on all above matters continued to September 7, 1940, 10 a. m. DST.

September 3, 1940. Secured proof of debt of Michael H. O'Boyle in the amount of \$432.76 filed.

September 7, 1940. Further hearing had and petition of Algonquin State Bank, Hartman and Son and Northern Illinois Finance Company filed praying for order authorizing sale of certain cattle contained in conditional sales contract and chattel mortgage as perishable property, prayer of petitions granted as per order (Dft.)."

6. By the said conciliation commissioner's order the report of appraisal of the real and personal property and setting off exemptions of and to said farmer debtor was approved as follows:

Real estate consisting of a gross acreage of 87 1/2 acres of which approximately 5 acres is subject to drainage easement

\$16,000.00

| | |
|-------------------------------|----------|
| Household and garden utensils | \$107.00 |
| 3 Horses | 90.00 |
| 4 Yearling heifers | 60.00 |
| 18 Dairy cows | 1170.00 |
| 1 Bull | 100.00 |

| | | |
|--|-----------|----------|
| 20 Hogs | 60.00 | |
| 130 Poultry | 50.00 | |
| 1 Automobile | 275.00 | |
| Farming equipment | 274.00 | |
| | | |
| Total of household goods, garden utensils, livestock, automobile and farming equipment | \$2186.00 | 2,186.00 |

of which the following personal property was so set off as exempt:

| | | |
|-----------------------------------|----------|--------|
| Household and garden utensils | \$107.00 | |
| Equity in automobile | 44.00 | |
| Farm equipment | 249.00 | |
| | | |
| Total personal property exemption | \$400.00 | 400.00 |

Thus leaving, after setting of said exemptions the following personal property in said estate subject to the provisions of Section 75:

| | |
|--|------------|
| 3 Horses | |
| 4 Yearling heifers | |
| 18 Dairy cows | |
| 1 Bull | |
| 20 Hogs | |
| 130 Poultry | |
| 1 Automobile (of which \$44. is exempt out of a total valuation of \$275). | |
| Farming equipment to the value of \$25 (\$274 Total value, \$249 exempt). | |
| Total value of personal property not exempt | \$1,786.00 |

Of said personal property the only revenue producing portion is 18 dairy cows while fresh (each cow being out

of production and a dead expense for an average period of two to four months each year); 20 hogs which can produce nothing except sale value once, and 130 poultry; said dairy cows being practically the sole income producing chattels.

Said real estate is not capable of producing sufficient feed forage and bedding for said livestock and therefore in itself produces no direct revenue, or if there be any it is more than off set by the necessity of purchasing feed, forage, bedding, medicines, and veterinary services for said livestock.

7. Said order further provides for a stay of proceedings against the said farmer debtor or his property for a period of three years from April 26, 1940.

8. Said order bears the written approval of three creditors of said farmer debtor, namely, Northern Illinois Finance Company, Algonquin State Bank, and E. C. Hook, and no other approval.

9. Said order was not presented to said farmer debtor or to his counsel and was not approved by him or by his counsel.

10. No objection was entered by the farmer debtor to said order and no hearing on any such objection has been had.

11. Said farmer debtor at all times during the pendency of said reference desired, and he still desires, to present evidence upon the subjects of said order but he has not had opportunity to do so.

12. The evidence to be so presented, if opportunity be afforded to present it, will demonstrate that said sums of rental and said sums of additional payments are not pursuant to law.

13. Said period fixed for the retention of possession of his property by the farmer debtor is contrary to law.

14. Said period fixed for the said stay of proceedings is contrary to law.

Wherefore said farmer debtor respectfully prays that Your Honor as said Conciliation Commissioner rehear the said matter in so far as it relates to the said order and that he be given an opportunity to present his evidence relating thereto.

Henry Anton Pfister,
Farmer Debtor.

(Duly verified.)

And on, to wit, the 23rd day of September, A. D. 1940, came the debtor by his attorneys and filed in the Conciliation Commissioner's office of said Court his certain Amendment to Petition for Rehearing in words and figures following, to wit:

**AMENDMENT TO PETITION FOR REHEARING OF
ORDER OF AUGUST 13, 1940.**

Filed September 23, 1940, with Conciliation Commissioner.

Now comes the farmer debtor and amends his Petition for Rehearing of the order of August 13, 1940, by adding thereto the following:

15. Said farmer debtor was from the filing of his petition herein on February 28, 1940, represented by J. E. Dazey, attorney at law, of Findlay, Illinois, who obtained the services of Robert E. Coulson of Waukegan, Lake County, Illinois, a young attorney beginning to practice at this time, and who was not at any time authorized to do anything in said cause except as authorized by said Attorney Dazey, that is, to file papers prepared by said Attorney Dazey and mailed to him, and up to September 7, 1940, said Attorney Dazey did not know of any stipulations or agreements in reference to this Cause. Said J. E. Dazey, the said farmer debtor's counsel, became seriously ill on May 21, 1940, with high blood pressure which resulted in a stroke of apoplexy, since which time he has been unable to attend to any case in court and has been able to do only a little office work, and his blood pressure since said stroke has been as high as two hundred thirty-two and on September 18, 1940, was still one hundred ninety-two.

Said farmer debtor attaches hereto a copy of the affidavit of said Attorney J. E. Dazey which he makes a part of this petition for rehearing. The original of said affidavit has been filed with Your Honor as said conciliation commissioner on September 20, 1940, in this matter, being incorporated in the motion for a rehearing of the order of September 7, 1940.

When said Attorney Dazey learned on or about September 7th, 1940, that the said order of August 13, 1940, had been entered, he, as soon as he could do so, retained the only counsel he could obtain who has had extensive practice in farmer debtor proceedings, namely, Elmer Mc-

Clain, Attorney at Law, Lima, Ohio, to investigate the docket and file in said Cause in the United States District Court and in the office of said conciliation commissioner and to do whatever should be necessary to conserve and protect the rights of said farmer debtor.

16. Your petitioner attaches to this amendment to his petition for rehearing a copy of the affidavit of said Robert E. Coulson which he makes a part hereof. On September 20, 1940, your petitioner filed with Your Honor as said conciliation commissioner the original of said affidavit of said Robert E. Coulson. Said original affidavit was incorporated in your petitioner's Petition for Rehearing of the order of September 7, 1940, which Petition for Rehearing is now pending.

Henry Anton Pfister,
Farmer Debtor.

(Duly Verified.)

(Said Affidavit of J. E. Dazey referred to in the foregoing Amendment to Petition appears at R. 34 at the end of the Petition for Emergency Restraining Order which begins at R. 27.)

(Said Affidavit of Robert E. Coulson referred to in the foregoing Amendment to Petition appears at R. 94 at the end of the Petition for Rehearing of Orders of September 7, 1940, which begins at R. 88.)

And on, to wit, the 3rd day of October, A. D. 1940, came the Algonquin State Bank by its attorneys and filed in the Clerk's office of said Court its certain Motion to Strike in words and figures following, to wit:

MOTION TO STRIKE PETITION FOR REHEARING.

Filed October 3, 1940, in District Court.

Now comes the Algonquin State Bank, an Illinois banking corporation; Northern Illinois Finance Corporation, a Delaware corporation; and Hartman & Son, a co-partnership; by their respective attorneys, and enter their special appearance in the matter of the petition for rehearing of the order of August 13, 1940, for the purpose of questioning the jurisdiction of said conciliation commissioner, to entertain said petition; and as reason therefor, say:

That said order was entered by said conciliation commissioner on the 13th day of August, A. D. 1940; that a copy of said order was, prior to the entry thereof, served upon Robert E. Coulson, the only resident attorney of record of said farmer debtor in this District; that no petition for review or extension of time to review said order was filed before said conciliation commissioner or with the United States District Court within the time provided by rule of Court, by virtue whereof said conciliation commissioner has lost jurisdiction to review or reconsider said order of August 13, A. D. 1940.

Wherefore, the undersigned pray that said petition for re-hearing of the order of August 13, A. D. 1940, be dismissed for want of jurisdiction.

Dated at Elgin, Kane County, Illinois, this 1st day of October, A. D. 1940.

Algonquin State Bank,
an Illinois banking corporation.
Henry L. Cowlin,
Northern Illinois Finance Corporation,
a Delaware corporation.
Carbary & Teschke,
Hartman & Son,
a co-partnership.
Elmer C. Tobin.

And afterwards, to wit, on the 28th day of November, A. D. 1940, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter M. Givler, Referee in Bankruptcy, appears the following entry, to wit:

**ORDER OVERRULING MOTION TO DISMISS PETITION
FOR REHEARING.**

Entered November 28, 1940, by Conciliation Commissioner.

This matter coming on to be heard this 28th day of November, A. D. 1940, upon the petition for a review of the order entered in the above entitled cause on August 13, A. D. 1940, and upon the special appearances filed herein on behalf of Hartmann and Sons, a Co-partnership, Northern Illinois Finance Corporation, a Delaware Corporation, and the Algonquin State Bank, an Illinois banking corporation, asking that said petition be dismissed for the reasons therein contained, and the Court, having heard the arguments of counsel, finds that said motion should be dismissed.

It Is Therefore, Ordered, Adjudged and Decreed by the Court that the motion of the said Hartman and Sons, a Co-partnership, Northern Illinois Finance Corporation, a Delaware Corporation, and the Algonquin State Bank, an Illinois banking corporation, be and the same is hereby overruled.

And now said matter coming on further to be heard after the overruling of said motion, the said Hartman and Sons, a co-partnership, Northern Illinois Finance Corpora-

tion, a Delaware Corporation, and the Algonquin State Bank, an Illinois Corporation, elect to stand by their motion so filed.

Enter:

Walter M. Givler,
Referee.

In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Farmer Debtor. Case No. 72357.

**ORDER IN RE APPLICATION FOR REHEARING OF
ORDER OF AUGUST 13, 1940.**

This matter having come on to be heard on the 28th day of November, 1940, upon the application of the farmer debtor herein for a rehearing of the order of August 13, 1940, and the farmer debtor having been present in open Court in his own proper person and being represented by his attorney of record, and the following named creditors, Algonquin State Bank, an Illinois banking corporation, Hartman & Son, a co-partnership, Northern Illinois Finance Corporation, a Delaware corporation, E. C. Hook and Emil Geest, being present by their respective attorneys, and a full and complete hearing having been had upon said application for rehearing, the undersigned, being fully advised in the premises, Finds:

That the petition for rehearing of the order of August 13, 1940, should be denied, and that the statement of facts, discussion and conclusion as concluded by the undersigned and filed herein should be made a matter of record in said cause.

It Is Therefore Ordered, Adjudged and Decreed that the petition for rehearing of the order of August 13, 1940, be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the statement of facts, discussion and conclusion on said petition for rehearing be by reference made part of this order as fully and completely as if same had been set out herein.

Entered this 28th day of November, A. D. 1940.

Walter M. Givler,
Conciliation Commissioner.

And on, to wit, the 11th day of October, A. D. 1940, came the E. C. Hook and Emil Geest by their attorneys and filed in the Conciliation Commissioner's office of said Court their certain answer in words and figures following, to wit:

**ANSWER OF E. C. HOOK AND EMIL GEEST TO THE
PETITION AND AMENDMENT FOR REHEARING
OF THE ORDER ENTERED AUGUST 13, 1940.**

Filed October 14, 1940, with Conciliation Commissioner.

Now comes E. C. Hook and Emil Geest secured creditors in the above case, by Joseph N. Sikes and John V. Mooradian, and Peden and Overholser their respective attorneys, and files this, their Answer to the Petition for Rehearing filed by said Debtor herein on September 16, 1940, and the amendment thereto filed herein on September 23, 1940, for a rehearing of the order entered herein on August 13, 1940, and say:

1. That they admit the allegations contained in Paragraphs 1, 2, 3 and 4 of said Petition for Rehearing.

2. That as to the allegations contained in Paragraph 5 of said Petition for Rehearing, they admit that Commissioner's docket shows the entries as set forth in Paragraph 5 of said Petition for Rehearing.

3. That as to the allegations contained in Paragraph 6 of said Petition for Rehearing, they say that an appraisal of all the real and personal property of said farmer debtor was duly made and approved by the Commissioner and that the exemptions of said Debtor were fully set off as provided by law, all as will more fully appear by the appraisers' report on file in said cause and by the order approving the same and by the order setting off said exemption. That as to the remaining allegations contained in said paragraph, they neither admit or deny the same, but demand strict proof thereof.

4. As to the allegations contained in Paragraph 7, they admit that the three-year period begins from April 26, 1940; that said three-year period was fixed pursuant to the petition and motion of said farmer debtor, filed herein on August 10, 1940, by said debtor, through his attorneys, Robert E. Coulson and J. E. Dazey, which petition bears the signature of said debtor and specifically states "that the end of the first year of your petitioner's moratorium will be on to-wit: the 26th day of April, A. D. 1941."

5. As to the allegations contained in Paragraph 8, they say that said order of August 13, 1940, bears the

approval of the three creditors therein set forth, but deny that said order had no other approval.

6. That they deny the allegations contained in Paragraph 9 of said Petition for Rehearing, and aver that said order, before the same was filed, was duly presented to Robert E. Coulson, attorney for said farmer debtor, said attorney approved said order as to form and, at his request, an objection to the entry of the same was noted therein.

7. That they deny the allegations contained in Paragraph 10 of said Petition for Rehearing.

8. As to the allegations in Paragraph 11 of said Petition, they aver that said farmer debtor, prior to the entry of said order on August 13, 1940, at all times had the full opportunity to present such evidence as he desired upon the subjects of said order; that he was afforded such opportunity at all times.

9. Answering the allegations contained in Paragraphs 12, 13 and 14 of said Petition, they deny that the rental so fixed and the additional payments are not pursuant to law; they deny that the period fixed for the retention of possession of the property by the farmer debtor is contrary to law; and deny that the period fixed for the said stay of proceedings is contrary to law, and aver that the period fixed is in accordance with the motion and petition of said farmer debtor, filed herein on August 10, 1940, wherein he designated the time for the commencement of such period as April 26, 1940; and they deny that said farmer debtor is entitled to any relief as prayed for in said petition and the amendment thereto.

10. Further answering said petition and amendment thereto, they say that so far as they know, said debtor was duly represented in all the proceedings herein by Robert E. Coulson and said J. E. Dazey; that at the first meeting of creditors, said debtor appeared in person and by Robert E. Coulson, his attorney, and submitted the debtor's proposal to the creditors, which was done on June 28, 1940. On July 9, 1940, said Robert E. Coulson was again present at the second meeting of the creditors and said Attorney Coulson then stated that he had no further proposal to submit to said creditors; that thereafter on July 23, 1940, the debtor's amended petition under Section 75 (s) was filed by Robert E. Coulson, debtor's attorney; that on July 25, 1940; said Robert E. Coulson moved for the appointment of the appraisers and moved that the debtor's exemption be set off to him; thereafter the appraisers were appointed by agreement of all parties and thereafter the appraisers filed their report, which was duly approved, and thereafter, the exempted property was set off to the debtor; on August 13, 1940, the debtor, through his attorney, joined the creditors in the motion asking that a reasonable rental for the personal and real property be fixed and the rental in question was then and there duly fixed as provided by law; that a copy of said order so entered on August 13, 1940, was duly submitted to said Robert E. Coulson for inspection; that he approved the same in form; that said debtor, through his attorney, has had a full and adequate notice of all the proceedings in said cause and has been duly and properly represented by his attorneys; that all proceedings were made with full notice to the

debtor and his attorneys; that the illness of J. E. Dazey was not communicated to the Commissioner, or to the creditors, until the filing of the petition herein on September 16, 1940, and that there was ample time between the date of said alleged illness, May 21, 1940, and the date of the entry of the order in question, August 13, 1940, for the farmer debtor to have employed other counsel to represent him if he deemed the same necessary; that the records show that no such action was taken and during such time, said Robert E. Coulson was present as attorney for said debtor, was advised of each and every step as matters progressed and appeared cognizant of the import and intent of every proceedings had herein, including the order of August 13, 1940.

11. That said farmer debtor, as shown by the record, was represented by two attorneys, J. E. Dazey of Findlay, Illinois, and Robert E. Coulson of Waukegan, Illinois; that J. E. Dazey is not a member of the Bar residing in this district and that said Robert E. Coulson was the only attorney of record for said farmer debtor residing in this district, and as such attorney, he had notice of all the proceedings had herein, pursuant to Rule 1, Subsection (e) of the Rules of the United States District Court for the Northern District of Illinois, Eastern Division.

12. That contrary to the allegations contained in said amendment to the petition for rehearing, said Attorney Robert E. Coulson, was admitted to practice to the State of Illinois, in 1936, and that he has been practicing for more than four years last past, and he fully understood the nature of the proceedings had herein.

13. That said debtor has not appealed from said order of August 13, 1940, within the time provided by law; that said order was entered upon full hearing, without mistake or fraud and with full notice.

13a. Answering the allegations of the amendment to said petition for rehearing, the said E. C. Hook and Emil Geest deny each and all of the material allegations therein contained and deny the allegations contained in the affidavit of said J. E. Dazey and said Robert E. Coulson attached to said amendment; and said E. C. Hook and Emil Geest further aver that they are informed and believe, and state the fact to be that the amounts fixed for the rental and principal pre-payments to be paid by said debtor in said order of August 13, 1940, were in accordance with the suggestions of said J. E. Dazey and that said order of August 13, 1940, was entered upon full notice and full hearing and in accordance with the law; as proved by said Section 75-S of said Bankruptcy Act.

13b. That the referee and Court are without jurisdiction to hear said petition for rehearing filed herein on September 16, 1940, and amendment thereto filed herein on September 23, 1940, to rehear the order entered August 13, 1940, for the reason that said petition for rehearing and the amendment thereto were not filed within the time provided by law, and were not filed within the time as required by Rule 37, and 14 of the Supreme Court and Rule 59 under the Act of Rules of Civil Procedure for the District Courts of the United States, and other rules applicable thereto and said petition and amendment thereto should be dismissed.

14. That said E. C. Hook is a secured creditor of said debtor, Henry Anton Pfister, that he secured a decree of sale of the real estate of said debtor in the Circuit Court of Lake County, Illinois, in case entitled: "E. C. Hook vs. Henry A. Pfister, and Others" Gen. No. 41356, and in and by said decree, said E. C. Hook was given a first and prior lien against the real estate of said debtor for a total sum of \$9,758.73 plus interest and that said amount due said E. C. Hook still remains unpaid and has been filed and allowed as a prior claim against the estate of said debtor.

15. That in addition to the claim of said E. C. Hook against the real estate of said debtor, said Emil Geest has a subsequent lien by virtue of a judgment rendered against said debtor in the Circuit Court of Lake County, Illinois, in the amount of \$6,030.82.

16. That in addition to said claims, the County Treasurer of Lake County, Illinois, has filed and has allowed in this proceeding a claim for general taxes against said real estate, in the amount of \$1,028.32.

Wherefore, said E. C. Hook and said Emil Geest pray that said Petition for Rehearing and the amendment thereto of the Order of August 13, 1940, be dismissed and denied, at debtor's costs.

Emil Geest,

E. C. Hook,

Creditors aforesaid.

(Duly Verified.)

And on, to wit, the 28th day of November, A. D. 1940, came the Conciliation Commissioner and filed in the

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Clerk's office of said Court his certain ~~Opinion~~ in words and figures following, to wit:

REFEREE'S OPINION AND DECISION ON PETITION
FOR REHEARING AND AMENDMENT THERETO
OF THE ORDER OF AUGUST 13, 1940.

Entered November 28, 1940, by Conciliation Commissioner.

Statement of Facts.

The debtor filed his petition and schedules on March 1, 1940, for a composition or extension under Section 75 of the National Bankruptcy Act including sub-section 6. Debtor failed to obtain the acceptance of a majority in number and amount of all creditors whose claims were affected by said composition, and on May 1, 1940, filed an amended petition to comply with Section 75-S of the Act.

Debtor's counsel were J. E. Dazey of Findlay, Illinois, and Attorney, Robert E. Coulson of Waukegan. The latter attended all of the hearings had in the matter before the Commissioner; Mr. Dazey never appeared at any time or at any hearing.

At the first meeting of creditors (June 29, 1940) debtor was present in person, sworn and examined; he was represented by Mr. Coulson. He submitted his proposal in writing which was rejected by a majority in number and amount of all creditors whose claims were affected. His testimony at the hearing disclosed that he was selling black dirt from his farm and was ordered to refrain from so doing in the future. It was further ordered also that the proceeds from his sale of milk, eggs and poultry be impounded and held by him subject to the order of the

Commissioner. No moneys were ever turned in to the Commissioner by debtor at any time.

Because of the nature of the proposal submitted, debtor was unable to obtain the acceptance of a majority in number and amount of all creditors whose claims were affected by said composition. He therefore amended his said petition pursuant to the provisions of Section 75-S of the Act.

Appraisers were appointed to appraise the real and personal property of debtor, in accordance with the terms of the Act, and on July 31, 1940, said appraisers filed their report setting forth a list of all of all of the real and personal property and their valuation of each item.

On August 2, 1940, the Commissioner filed a report of debtor's exempted property to be set apart and retained by him.

On August 10, 1940, Debtor petitioned the court to fix the amount of rent to be paid for the use of the encumbered real and personal property. This was done.

At the hearing on August 13, 1940, a hearing was held as to the fixing of the rental value for the property of said debtor and for the payment of principal due and owing by said debtor to the secured and unsecured creditors herein as their interests may appear, as provided by the provisions 75-S of said Act; and at that time, after due hearing with reference thereto, counsel for said debtor, Robert E. Coulson, suggested then and there that the rental and principal payments be fixed between two designated amounts each year and that said rental, so fixed, was at a figure between the maximum and minimum so suggested by debtor's counsel. That said debtor was afforded and

given full opportunity at such hearing to present evidence with reference to the rental value of said property; that at no time was he prevented from presenting such evidence; that said order of August 13, 1940, was duly presented to said Robert E. Coulson, attorney for said debtor; that the period for the stay of proceedings against said farmer debtor as fixed in said order from April 26, 1940, for a period of three years is in accordance with the motion and petition of said farmer debtor filed herein on August 10, 1940, wherein he designated a time for the commencement of such period as April 26, 1940.

That said debtor did not file a petition for review of the order entered on August 13, 1940, within ten (10) days from the entry thereof, as provided by the rules of this court and by the statute.

That on September 16, 1940, said debtor for the first time filed his petition for rehearing of said order of August 13, 1940, and thereafter on September 23, 1940, filed his amendment thereto, and that the creditors, E. C. Hook and Emil Geest, upon leave of court had and obtained, duly filed their answer to said petition for rehearing and the amendment thereto on October 11, 1940, which answer was duly amended on its face on this day, after leave of court given.

That the Algonquin State Bank, an Illinois Banking Corporation, Northern Illinois Finance Corporation, a corporation, and Hartmann and Sons, a Co-partnership, duly filed herein on October 3, 1940, the motion to strike said petition for rehearing and the amendment thereto on the ground, as more fully set forth in said motion, that this court was without jurisdiction to hear such petition, for

rehearing since the same was not filed within the time provided by law.

Discussion:

The petition for rehearing of said order of August 13, 1940, in substance primarily raises the following issues, namely: That the period fixed for the retention of possession of his property by the farmer debtor is contrary to law; that said order was not presented to said farmer debtor or his counsel and was not approved by him or his counsel; that he should be permitted to present evidence to demonstrate that the sums of rental and additional payments, as provided by the order, are not pursuant to law and that he was not properly represented in this matter by his counsel.

The Record, however, shows the following:

1. The first meeting of creditors was held on June 28, 1940. Debtor's counsel, Robert E. Coulson, was present at that time. Coulson, at this hearing, submitted in writing debtor's proposal which was rejected by the creditors in the presence of Debtor, and the latter was ordered to submit a counter-proposal.

2. At the second meeting of creditors, July 9, 1940, Coulson was again present, the debtor was not. Coulson stated that the debtor had no further proposal to submit to the creditors. A motion by one of the creditors to dismiss the petition as to Sections A to R was heard and allowed, and debtor was given 15 days to file an amended petition as provided by Section S of the Act.

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3. On July 23, 1940, the debtor's amended petition under Section 75-S was filed by Robert E. Coulson, debtor's attorney.

4. On July 25, 1940, Coulson moved for the appointment of appraisers, and further moved that Debtor's exemptions be set off to him. The motion was granted and the appraisers were appointed by agreement of all parties present.

5. The appraisers filed their report on July 31, 1940, which was approved, and the Commissioner set off to debtor his exempted property as provided by the Act.

6. At the hearing of August 13, 1940, the debtor again appeared, through his counsel, Robert E. Coulson, and at that time joined the creditors asking that a reasonable rental be fixed for the real and personal property of said debtor; that at that time the debtor's counsel suggested maximum figures and minimum figures for the rental and principal payments to be made by the debtor and, after hearing had, the order as entered fixed a rental and fixed the principal payments at amounts which were substantially less than the maximum amount suggested by the debtor's own counsel; that said debtor and his counsel at that time had full opportunity to present whatever evidence they saw fit with reference to the rental value of said property. No advantage was taken of this right, nor was any attempt made to introduce any evidence whatsoever; that after the entry of said order debtor's counsel, Robert E. Coulson, was presented with said order before the entry of the same; that he had full knowledge of the terms and provisions thereof prior to the signing of said

order and also received such knowledge from the presentation of said order to him, and that notwithstanding such knowledge, said debtor, or his counsel, did not file a petition for a review of such order within the time as required by law.

Any court must necessarily require that the business of its office be conducted through attorneys, so that an orderly procedure may be followed. An examination of the various hearings on this cause indicates clearly that at all times and at all hearings, the debtor was adequately and fully represented. Debtor at all times had full and ample opportunity to present his evidence or any defense he might desire, but for reasons best known to himself and his counsel, he did not do so.

Of all the various hearings held in this cause, debtor only attended two. The Commissioner on numerous occasions requested the presence of the debtor and J. E. Dazey so that more might be accomplished at each hearing.

If the debtor feels that he has not been properly or adequately represented, it is not because of the number or ability of his counsel. It is conceivable that debtor might feel the same way about any counsel he might subsequently engage, and might against petition for a rehearing on that ground. Certainly no purpose would be served by again trying the case with new or different counsel.

Much is made in the rehearing petition of the illness of J. E. Dazey. This condition of Dazey's health was first called to the Commissioner's attention by this petition. At no time during the proceedings was a continuance or extension of time requested because of it. It

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appears from the petition alone that Mr. Dazey suffered a stroke of apoplexy on May 21, 1940, or more than a month before the first meeting of creditors. If he did not feel able to carry on his work, he had an abundance of time to engage other counsel.

That said petition for rehearing charges that the period fixed for the stay of proceedings is contrary to law. The time fixed in the order is in pursuance to the motion and petition of said farmer debtor filed herein on August 10, 1940, wherein were designated the time for the commencement of such period as April 26, 1940.

Conclusion.

Under the facts and circumstances surrounding this case, it is the opinion and the order of the undersigned Referee that there is no equity or merit in the petition for rehearing of said debtor and that the same should be denied; and it is therefor the order of the undersigned that said petition for rehearing of said debtor filed herein on September 16, 1940, and the amendment thereto filed on September 23, 1940, for rehearing of the order entered herein on August 13, 1940, be and the same is hereby denied.

Enter:

Walter M. Givler,
Referee,

And on, to wit, the 28th day of November, A. D. 1940, came the Debtor by his attorneys and filed in the Clerk's office of said Court his certain Petition in words and figures following, to wit:

PETITION FOR REVIEW OF ORDER DATED AUGUST
13, 1940, WHICH BECAME FINAL NOVEMBER
28, 1940.

Filed November 28, 1940, with Conciliation Commissioner.

Your petitioner, Henry Anton Pfister, is the farmer debtor herein and as such was a party to the following certain farmer debtor proceedings pending before Honorable Walter M. Givler as the conciliation commissioner in charge thereof, namely:

Proceedings ordering payments of rental, certain additional payments, possession in said farmer debtor, and stay of proceedings.

Upon the hearing thereof a certain final order was made by the said conciliation commissioner as follows:

"In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Debtor and Bankrupt. No. 72557.

Order.

This cause coming on to be heard on the amended petition of said debtor filed under the provisions of section 75 of the Bankruptcy Act and on the motion of the creditors, E. C. Hook, Algonquin State Bank, and Northern Illinois Finance Company, for the fixing of a reasonable rental value for the property of said debtor, Henry Anton Pfister, and for the payment of principal due and owing by said debtor to the secured and unsecured creditors herein as their interest may appear, as provided by the provisions of section 75 (s) of said Act; and it appearing

to the court and the court now finds that said debtor has filed an amended petition herein for relief under said section 75 (s) and said debtor has been duly adjudged a bankrupt under said section 75 (s) and that the value of the debtor's property has been fixed by an appraisal heretofore had, which appraisal has been approved, all as provided by said section 75 (s); and that heretofore the court has duly set aside for the benefit of said debtor his exemptions as provided by said Act and the court now having considered said amended petition and said motion of said creditors and having heard evidence with reference to the usual, customary rental in the community where said property is located, based upon the rental value, net income and earning capacity of the property, and having considered evidence with reference to the protection of the rights of the creditors and the debtor's ability to pay with a view to his financial rehabilitation, and having heard arguments of counsel and having considered the suggestion of the debtor's counsel that it would be an aid to the rehabilitation of the debtor if payments required be reduced for the first year, increased in the second year, with a further increase for the third year, so that the total payments made will equal the sum determined by this Court as a fair annual amount to be paid, and now being fully advised in the premises, finds that the motion of said creditors for the fixing of said rental and for the payment of principal payments upon the amount due the creditors should be granted and the Court now finds that the reasonable rental for said property based upon the usual and customary rental in the community where the property is located, based upon the

rental value, net income and earning capacity of the property, would be the sum of \$2,125.00 per year; that it will assist the debtor to pay the sum of \$1,625.00, divided in semi-annual payments the first year, \$2,125 divided into semi-annual payments the second year and \$2,625.00 divided into semi-annual payments the third year, so that the total rental for the three-year period shall be paid in an amount equivalent to \$2,125.00 per year.

It Is, Therefore, Ordered that the possession of all of the real and personal property of said debtor, as set forth in the appraisal filed herein on July 31, 1940 (except that portion thereof designated and set apart as exempted property of said debtor as provided in the order this day entered approving the appraisers report and setting aside said exemptions), shall remain in the debtor under the supervision and control of the Court, subject to all existing mortgages, liens, pledges or encumbrances, and all such existing mortgages, liens, pledges or encumbrances shall remain in full force and effect and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the payment of the secured creditors as their interests shall appear.

It Is Further Ordered that such debtor shall be permitted to retain possession of such property during a period of 3 years from April 26, 1940, under the supervision and control of this Court, provided that said debtor pay into this court rental for such property \$2,125.00 per year (which sum is hereby fixed as a reasonable rental) in semi-annual installments as follows:

| | |
|------------------|-----------|
| October 26, 1940 | \$ 812.50 |
| April 26, 1941 | 812.50 |
| October 26, 1941 | 1062.50 |
| April 26, 1942 | 1062.50 |
| October 26, 1942 | 1312.50 |
| April 26, 1943 | 1312.50 |

Said rental shall be used first, for the payment of taxes and upkeep of said debtor's property, and the remainder shall be distributed among the secured and unsecured creditors of the debtor and applied on their claims as may hereafter be ordered by the court; and said debtor be and he is hereby ordered to pay said rental as above set forth. Said debtor be and he is further ordered to pay quarterly in addition to the rental above mentioned on the principal due and owing by said debtor to the secured and unsecured creditors, as filed herein, as their interests may appear, the following sums:

| | |
|--|----------|
| July 26, 1940 | \$406.25 |
| .(which time of payment is extended to August 28, 1940.) | |
| October 26, 1940 | 406.25 |
| January 26, 1941 | 406.25 |
| April 26, 1941 | 406.25 |
| July 26, 1941 | 531.25 |
| October 26, 1941 | 531.25 |
| January 26, 1942 | 531.25 |
| April 26, 1942 | 531.25 |
| July 26, 1942 | 656.25 |
| October 26, 1942 | 656.25 |
| January 26, 1943 | 656.25 |
| April 26, 1943 | 656.25 |

which principal payments, so required as aforesaid, the Court now finds is consistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation: The Court

hereby reserves to itself the right to order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor and to make such other and further orders as may be proper under section 75 of the Bankruptcy Act.

It Is Further Ordered that all judicial or official proceedings in any court or under the direction of any official against the debtor or any of his property be, and the same are hereby stayed for a period of three years from April 26, 1940, or until the further order of this court and if, however, the debtor at any time fails to comply with the provisions of said Section 75 of said Act, or with the orders of this court for the payment of rental and for the payment of principal due and owing, as above ordered, made pursuant to said section, or is unable to refinance himself within three years, this court shall order the appointment of a trustee and order the property sold or otherwise disposed of, as provided for in said Act; to the entry of which order the said debtor hereby objects, which objections, having been heard, are now hereby overruled.

Enter this 13th day of August, A. D. 1940.

Walter M. Givler,
Referee.

ok.

Northern Ill. Finance Co.

by Geo. D. Carbary

Their atty.

ok. Algonquin State Bank by

Henry C. Cowlin, atty.

ok. E. C. Hook by J. N. Sikes,

Atty."

Your petitioner duly filed his petition and amendments thereto seeking a rehearing of said final order to which said petition as so amended certain creditors filed their various pleadings. Said application for rehearing and the pleadings thereto were heard by said conciliation commissioner on November 28, 1940, and on November 28, 1940, said conciliation commissioner issued and entered his order and decision thereon denying said application for rehearing. Whereby said order of August 13, 1940, became final on November 28, 1940. Said order of November 28, 1940, is attached and made a part of this Petition for Review.

Said order is erroneous in the following respects, namely:

1. Said farmer debtor being a farmer and not familiar in any respect with legal procedure or substantive law pertaining to said proceedings and matters he was without legal representation as a result of the sudden and unforeseen serious illness and incapacity of his sole counsel who was retained by him, namely J. E. Dazey, an attorney at law, and who before and during the pendency of said matters suffered an attack of apoplexy with high blood pressure of 232 which remained at 192 on September 18, 1940. Without the authorization of said farmer debtor certain statements were claimed to have been made by one Robert E. Coulson who was instructed by said Attorney Dazey only to file papers. By said unfortunate and unforeseen circumstances said farmer debtor has not had due process of law in said proceedings.

2. Said farmer debtor has been unable to present either evidence of facts or legal authorities or arguments in said matters whereby he could maintain his rights under Section 75 of the Bankruptcy Act under which said proceedings were and are pending.

3. Said order is contrary to law and to the evidence and the letter and spirit of Section 75 of the Bankruptcy Act.

4. Said order further erred in ordering a total rental payment of \$6,375.00 within 3 years which were ordered to be paid in semi-annual installments.

5. Said order further erred in requiring additional payments of \$6,375.00 within 3 years to be made in quarterly installments, making a total of \$12,750.00 to be paid out of the proceeds of the farm of said farmer debtor within 3 years, being an average total payment of \$4,250.00 for each year, in quarterly and semi-annual installments.

6. Said order further erred in making the three year stay start from April 26, 1940.

7. Said order further erred in ordering possession to remain in said farmer debtor for a period of three years beginning April 26, 1940.

8. Said order is erroneous in that no evidence was taken upon the subject of said payments totalling \$12,750.00, to be made within three years in quarterly and semi-annual installments.

9. Said order is erroneous in that evidence was not taken upon the various items thereof.

Wherefore, petitioner prays that said order be reviewed and reversed and for such order as may be just

and right and that he be restored to all things he has lost by reason of said errors.

(Duly verified.)

And on, to wit, the 30th day of November, A. D. 1940, came the Conciliation Commissioner and filed in the Clerk's office of said Court his certain Certificate in words and figures following, to wit:

CERTIFICATE OF CONCILIATION COMMISSIONER
ON PETITION TO REVIEW ORDER OF
AUGUST 13, 1940.

Filed November 30 in District Court.

Now comes Walter M. Givler, Referee in the above matter, and certifies to the Judges of said Court the following:

That on November 28, 1940, said farmer debtor, Henry Anton Pfister, filed with the undersigned his petition for review for the purpose of reviewing the order of the undersigned entered on November 28, 1940, denying said debtor's petition for rehearing filed for the purpose of rehearing the order entered on August 13, 1940.

The undersigned, for the purposes of this review, submits herewith the following documents and orders:

- (1) Petition for review of said farmer debtor wherein is set forth the debtor's points and questions raised
- (2) Petition for rehearing filed September 16, 1940.
- (3) Amendment to petition for rehearing filed September 23, 1940.

(4) Answer of E. C. Hook and Emil Geest, creditors, to said petition for rehearing and amendment thereto filed October 11, 1940.

(5) Motion to strike said petition for rehearing by creditors, Algonquin State Bank et al.

(6) Order denying motion to strike.

(7) Opinion and order denying petition for rehearing entered November 28, 1940.

Respectfully submitted,

Walter M. Givler,
Referee as aforesaid.

And afterwards, to wit, on the 16th day of December, A. D. 1940, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

ORDER OF DISTRICT COURT IN RE PETITION FOR
REVIEW OF ORDER OF AUGUST 13, 1940.

Filed December 16, 1940, in District Court.

This matter coming on to be heard on the petition for review of the order entered by Walter M. Givler, Referee in this cause, on August 13, 1940, on the motion of creditors, E. C. Hook, Algonquin State Bank, an Illinois banking corporation, and Northern Illinois Finance Company, a Delaware corporation, providing for payments of rental and principal payments, possession in the farmer debtor and bankrupt herein, and stay of proceedings, pursuant to the provisions of Section 75-S of the Bankruptcy

Act, which petition for review was filed with said Referee on November 30, 1940, and the Court, having examined the records and proceedings certified to this Court by said Walter M. Givler, Referee herein, and having heard arguments of counsel and being fully advised in the premises, now finds:

. That said order of August 13, 1940, was duly entered by said Referee in this cause on said date; that no petition for review of or appeal from said order was filed or taken within the time and period of limitation, as provided by Section 39C of the Bankruptcy Act and Rule 14 of this Court; that after the expiration of such time and period of limitation for filing a petition for review and taking an appeal from said order, said farmer debtor and bankrupt herein filed with said Referee on September 16, 1940, his petition for a rehearing of said order so entered on August 13, 1940, and thereafter, on September 23, 1940, filed with said Referee his amendment to his petition for rehearing of said order of August 13, 1940; that said petition for rehearing and the amendment thereto was denied by said Referee in the matter of said cause on November 28, 1940; that thereafter, on November 30, 1940, said farmer debtor and bankrupt herein filed with said Referee for the first time a petition for review of said order entered on August 13, 1940.

That said petition for rehearing of said order of August 13, 1940, was filed after the expiration of the time or period of limitation allowed by the rules of court and statute in such case made and provided for the filing of a petition for review of said order, and said petition for re-

hearing having been denied no appeal lies therefrom and the filing and the denial of said petition for rehearing did not extend the time for filing a petition for review or the taking of an appeal from said order of August 13, 1940, and this Court is without jurisdiction to hear and review the matters set forth in said petition for review, so filed herein on November 30, 1940, and the same should be dismissed.

It Is, Therefore, Ordered, Adjudged and Decreed that said petition for review of said order so entered on August 13, 1940, providing for payment of rental and principal payments, possession in said farmer debtor and stay of proceedings herein, be and the same is hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that said Referee, Walter M. Givler, be and he is hereby directed to proceed and carry into effect said order so entered on August 13, 1940.

Entered at Chicago, Cook County, Illinois, this 16th day of December, A. D. 1940.

Wm. H. Holly,
Judge.

And afterwards, to wit, on the 16th day of December, A. D. 1940, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

ORDER OF DISTRICT COURT RE PETITION FOR
REVIEW OF ORDER OF SEPTEMBER 7, 1940,
AND SEPTEMBER 30, 1940.

Filed December 16, 1940, in District Court.

This matter coming on to be heard on the petition for review of the three orders entered by Walter M. Givler, Referee in this cause, on September 7, A. D. 1940, on the petitions of Algonquin State Bank, an Illinois banking corporation, Northern Illinois Finance Corporation, a Delaware corporation, and Hartman & Son, a co-partnership, creditors of the debtor and bankrupt herein, providing for the sale of personal property of said debtor and bankrupt herein, described in said orders, which petition for review was filed with said Referee on October 9, 1940, and the Court, having examined the records and proceedings certified to this Court by said Walter M. Givler, Referee herein, and having heard arguments of counsel and being fully advised in the premises, now finds:

That said three orders of September 7, A. D. 1940, were duly entered by said Referee in this cause on said date; that no petition for review of or appeal from said orders or either of them was filed or taken within the time and period of limitation as provided by the rules of Court and the statute in such case made and provided; that after the expiration of such time and period of limitation for filing a petition for review and taking an appeal from said orders, said farmer debtor and bankrupt herein filed with said Referee on September 20, A. D. 1940, in said cause, his petition for a re-hearing of said orders, so entered on September 7, A. D. 1940; that said petition for

rehearing was denied by said Referee in the matter of said cause on September 30, A. D. 1940; that thereafter on October 9, A. D. 1940, said farmer debtor and bankrupt herein filed with said Referee for the first time a petition for review of said three orders entered on September 7, A. D. 1940, and the order denying said petition for rehearing entered on September 30, A. D. 1940; that said petition for rehearing of said orders of September 7, A. D. 1940, was filed after the expiration of the time or period of limitation allowed by the rules of Court and the statute in such case made and provided, and said petition for rehearing having been denied, no appeal lies therefrom; and the filing and denial of said petition for rehearing did not extend the time for filing a petition for review or an appeal of said orders of September 7, A. D. 1940, and this Court is without jurisdiction to hear and review the matters set forth in said petition for review so filed herein on October 9, A. D. 1940, and the same should be dismissed.

It Is Therefore Ordered, Adjudged and Decreed by the Court that said petition ~~for~~ review of said three orders so entered on September 7, A. D. 1940, for the sale of the personal property as therein set forth, entered upon the petitions of said creditors above mentioned be and the same is hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that said petition for review of the order entered on September 30, A. D. 1940, entered by said Referee, denying the petition for rehearing filed by said farmer debtor as above mentioned be and the same is hereby likewise dismissed.

It Is Further Ordered, Adjudged and Decreed that said Referee Walter M. Givler be and he is hereby directed to proceed and carry into effect said orders so entered on September 7, A. D. 1940.

Entered at Chicago, Cook County, Illinois, this 16th day of December, A. D. 1940.

Wm. H. Holly,
Judge.

And on, to wit, the 30th day of December, A. D. 1940, came the Debtor by his attorneys and filed in the Clerk's office of said Court his certain Motion in words and figures following, to wit:

Please Take Notice that on Monday, December 30, 1940, at the opening of Court or as soon thereafter as counsel can be heard, we shall appear before the Honorable William H. Holly, in the courtroom usually occupied by him, Federal Building, Chicago, Illinois, and shall move the Court to vacate the orders heretofore entered on December 16, 1940, dismissing the Petitions of Review of Farmer-Debtor from orders entered by the Referee, Walter M. Givler, Esq., in the above cause on August 13, 1940, and September 30, 1940, and to reconsider said Petitions for Review, and for grounds thereof will present and cite to the Court the cases of Bowman vs. Loperno, 85 L. Ed. 139, and Wright vs. Union Cent. Life Ins. Co., 85 L. Ed. 166, both decisions rendered by the United States Supreme Court, October Term, 1940, and published in the Reports since the entry of the orders herein on December 16, 1940, in support of our motion; at which time and place you may appear if you so see fit.

Culver & Mendelson,

Attorneys for Farmer-
Debtor.

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And afterwards, to wit, on the 14th day of January, A. D. 1940, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

**MEMORANDUM OF DISTRICT COURT DENYING
MOTION TO VACATE ORDERS OF
DECEMBER 16, 1940.**

Entered January 14, 1941, in District Court.

I have re-examined the opinion of the Supreme Court in Bowman, petitioner, vs. Laperena et al., decided December 9, 1940, and am of the opinion that the order heretofore entered by me should stand. The motion to vacate said order will therefore be denied. An order accordingly has this day been entered.

Wm. H. Holly,
Judge.

Dated January 14, 1941.

And on, to wit, the 14th day of January, A. D. 1941, came the Debtor Appellant by his attorneys and filed in the Clerk's office of said Court his certain Notices of Appeal in words and figures following, to wit:

**NOTICE OF APPEAL RELATING TO ORDERS OF
SEPTEMBER 7, 1940.**

Filed January 14, 1941, in District Court.

Notice is hereby given that Henry Anton Pfister, the Farmer-Debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the order and final judgment entered in this action

on December 16, 1940, which dismissed the petition of said Henry Anton Pfister to review the three orders of conciliation commissioner, Walter M. Givler, which orders were entered September 7, 1940, and which said orders became final September 30, 1940, and the motion of Farmer-Debtor of December 30, 1940, to vacate said order of December 16, 1940, and to re-consider said Petition for Review was denied on January 14, 1941.

(Bond on Appeal executed by Henry Anton Pfister as principal and United States Fidelity and Guaranty as surety is omitted.)

**NOTICE OF APPEAL RELATING TO ORDER OF
AUGUST 13, 1940.**

Filed January 14, 1941, in District Court.

Notice is hereby given that Henry Anton Pfister, the farmer debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the order and final judgment entered in this action on December 16, 1940, which dismissed the petition of said Henry Anton Pfister to review the order of conciliation commissioner Walter M. Givler entered August 13, 1940, which order of said conciliation commissioner became final November 28, 1940, and the motion of Farmer-Debtor of December 30, 1940, to vacate said order of December 16, 1940, and to re-consider said Petition for Review was denied on January 14, 1941.

(Bond on Appeal executed by Henry Anton Pfister and United States Fidelity and Guaranty Company is omitted.)

*Cost Bonds on Appeal
Order Consolidating Appeals*

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And afterwards, to wit, on the 20th day of January, A. D. 1941, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

**TWO COST BONDS ON APPEAL FILED JANUARY
14th A. D. 1941, AS FOLLOWS:**

Henry Anton Pfister, Farmer Debtor. No. 72557.

Know All Men by These Presents: That we, Henry Anton Pfister, as principal, and United States Fidelity & Guaranty Company, as Sureties * * *

Henry Anton Pfister, Farmer Debtor. No. 72557.

Know All Men by These Presents: That we, Henry Anton Pfister, As Principal and United States Fidelity and Guaranty Company, as sureties * * *

And afterwards, to wit, on the 20th day of January, A. D. 1941, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

ORDER CONSOLIDATING APPEALS.

Entered January 20, 1941, in District Court.

Upon application by the appellant and for good cause shown the appeals taken on January 14, 1941, from the orders of this court entered on December 16, 1940, are consolidated.

Wm. H. Holly,
Judge.

And on, to wit, the 12th day of February, A. D. 1941, came the Appellees by their attorneys and filed in the Clerk's office of said Court their certain Designation in words and figures following, to wit:

DESIGNATION OF CONTENTS OF RECORD ON
APPEAL AND STATEMENT OF POINTS.

Filed February 3, 1941, in District Court.

To: Northern Illinois Finance Corporation, Algonquin State Bank, Hartman and Son, E. C. Hook, and Emil Geest:

The appellant designates the following portions of the record and proceedings to be contained in the record on appeal of the above causes which have been consolidated by order of the District Court for the purposes of appeal:

1.—Title page.

2.—Caption.

3.—All entries on clerk's Bankruptcy Docket in Chicago office.

4.—All entries on docket of conciliation commissioner in Waukegan.

Note to the Clerk: In compliance with the Rules of Civil Procedure, with the Rules of the Circuit Court of Appeals for the Seventh Circuit, and with the Rules of the Supreme Court, in all documents the captions and verifications, proofs of service and notices of hearing are to be omitted except where otherwise designated herein. In place of captions and verifications and other omitted matter the words (Caption) and (Duly verified) or other

suitable words shall be substituted at proper places. In place of such duplications proper cross references are to be inserted. All duplications such as documents, descriptions of property, etc., are to be omitted and proper cross references made.

5.—Petition under Section 75 (a) to (r) for composition or extension filed February 28, 1940, and the portions of schedules designated below, omitting signatures, and omitting all printed parts except as stated:

6.—Schedule A-1: b (1), (2), (3); c (1), (2), and total; Schedule A-2 and total; Schedule A-3 and total; Schedule A-4; Schedule A-5; Schedule B-1; Schedule B-2, A, B, C, D, E, F, G, H, I, J, K, L, and total; Schedule B-3, A, B, C, D; Schedule B-4 total none; Schedule B-5: Include that portion of printed form reading: Property claimed to be exempt by state laws with reference to the statute creating the exemption and include the typed statements; Schedule B-6; Summary of debts and assets in full as printed and typed.

7.—Order of general reference to Conciliation Commissioner Kirby by Judge Holly, entered February 29, 1940.

8.—Petition under Section 75 (s) filed July 19, 1940.

9.—Order of Adjudication on Amended Petition, entered July 20, 1940.

10.—Petition for emergency restraining order, filed September 17, 1940.

11.—Affidavit of J. E. Dazey filed September 19, 1940.

12.—Answer to petition for emergency restraining order filed September 19, 1940.

13.—Memorandum of Judge Holly dated September 19, 1940, initialed WHH and numbered 162 denying petition to restrain sale.

14.—Petition of Hartman and Son to conciliation commissioner to reclaim certain cattle, filed with conciliation commissioner August 7, 1940.

15. Petition of Algonquin State Bank to conciliation commissioner to turn over certain cattle, etc., filed with conciliation commissioner August 7, 1940.

16. Petition of Northern Illinois Finance Corporation to conciliation commissioner to turn over certain cattle filed with conciliation commissioner August 10, 1940.

17. Petition of farmer debtor for an order fixing amount of rental filed with conciliation commissioner on August 10, 1940.

18. Appraisement of real estate and personal property filed with conciliation commissioner on July 31, 1940, and approved by conciliation commissioner on August 13, 1940.

19. Order of conciliation commissioner fixing rental and ordering additional payments entered by conciliation commissioner on August 13, 1940.

20. Order bearing file mark of referee dated September 7, 1940, re petition of Hartman and Son.

21. Order bearing file mark of referee dated September 7, 1940, re petition of Algonquin State Bank.

22. Order bearing file mark of referee dated September 7, 1940, re petition of Northern Illinois Finance Corporation.

23. Petition to conciliation commissioner for rehearing of orders of September 7, 1940, filed September 20, 1940.

24. Amendment to petition for rehearing of the orders of September 7, 1940, filed September 23, 1940.

25. Answer to petition for rehearing of orders of September 7, 1940, filed September 26, 1940.

26. Reply of farmer Debtor to "Answer to Petition for Rehearing of orders of September 7, 1940," etc., filed September 26, 1940.

27. "Referee's Opinion and Decision on Petition for Rehearing of Orders of September 7, 1940," marked filed by Referee on September 30, 1940.

28. Petition for Review of three orders dated September 7, 1940, bearing file mark of referee dated October 9, 1940.

29. Certificate on review signed by Walter M. Givler, Referee, filed October 15, 1940.

30. Special appearance and motion of Algonquin State Bank, Northern Illinois Finance Corporation and Hartman and Son filed October 17, 1940.

31. Answer of Algonquin State Bank, Northern Illinois Finance Corporation and Hartman and Son, to the Petition for Review of Orders of September 7, 1940, filed October 17, 1940.

32. Petition to conciliation commissioner for rehearing of order of August 13, 1940, fixing rent and extra payments, marked filed by Referee September 16, 1940.

33. Amendment to Petition for Rehearing of the Order of August 13, 1940, marked filed by referee September 23, 1940.

34. Motion of Algonquin State Bank, Northern Illinois Finance Corporation and Hartman and Son to dismiss petition for rehearing of order of August 13, 1940, for want of jurisdiction, marked filed by referee October 3, 1940.

35. Order overruling motion of Algonquin State Bank, Northern Illinois Finance Corporation and Hartman and Son to dismiss petition for rehearing of order of August 13, 1940, marked filed by referee November 22, 1940.

36. Answer of E. C. Hook and Emil Geest to petition for rehearing of order of August 13, 1940, marked filed by referee October 11, 1940.

37. "Referee's Opinion and Decision on Petition for Rehearing and Amendment thereto of the order of August 13, 1940," marked filed by referee November 28, 1940.

38. Petition for review of order dated August 13, 1940, bearing mark filed by Referee November 28, 1940.

39. Certificate on review signed by Walter M. Givler, Referee, filed November 28, 1940.

40. Order of District Court entered December 16, 1940, dismissing petition for review of order of conciliation commissioner entered August 13, 1940, for rental and other payments.

41. Order of District Court entered December 16, 1940, dismissing petition for review of three orders of conciliation commissioner entered September 7, 1940, for sale of certain chattels.

42. Motion to vacate orders of December 16, 1940, and to rehear petitions for review of conciliation commissioner's orders, filed December 30, 1940 (Omit caption, parties to whom notice was addressed and proof of service).

43. Memorandum and order of Judge Holly dated and entered January 14, 1941, denying motion to vacate orders of December 16, 1940.

44. Notices of appeal from orders of December 16, 1940, dismissing petition to review conciliation commissioner's order of August 13, 1940, and dismissing petition to review conciliation commissioner's orders of September 7, 1940, said notices having been filed January 14, 1941.

45. Bonds on appeal filed January 14, 1941. Include only a statement naming the principal and the surety on each bond.

46. Order consolidating appeals entered January 20, 1941.

47. Designation of Contents of Record on Appeal including caption.

48. Statement of Points.

49. Certificate of Clerk.

Note: A Concise Statement of the Points on which the appellant intends to rely on appeal is appended to this designation.

CONCISE STATEMENT OF THE POINTS ON WHICH
THE APPELLANT INTENDS TO RELY
ON APPEAL.

1. The District Court erred in dismissing the petition to review the order of the conciliation commissioner entered by the conciliation commissioner on August 13, 1940, which became final on November 28, 1940.

2. The District Court erred in dismissing the petition to review the three orders of the conciliation commissioner entered by the conciliation commissioner on September 7, 1940, which three orders became final on September 30, 1940.

3. The District Court erred in denying the motion of the appellant to vacate its order of December 16, 1940, dismissing the petition to review the order of the conciliation commissioner entered by the conciliation commissioner on August 13, 1940, which order of the conciliation commissioner became final on November 28, 1940.

4. The District Court erred in denying the motion of the appellant to vacate its order of December 16, 1940, dismissing the petition to review the three orders of the conciliation commissioner entered by the conciliation commissioner on September 7, 1940, which three orders of the conciliation commissioner became final on September 30, 1940.

5. The District Court erred in refusing to hold that the considering and entertaining by the conciliation commissioner of the petition to the conciliation commissioner for rehearing of the conciliation commissioner's order en-

tered August 13, 1940, destroyed the finality of said order of August 13, 1940, for the purpose of seeking a review thereof, so that said order became final on November 28, 1940, for the purpose of review.

6. The District Court erred in refusing to hold that the considering and entertaining by the conciliation commissioner of the petition to the conciliation commissioner for rehearing of the conciliation commissioner's three orders entered September 7, 1940, destroyed the finality of said three orders of September 7, 1940, for the purpose of seeking a review thereof, so that said three orders became final on September 30, 1940, for the purpose of review.

7. The District Court erred in refusing to consider the rule upon the petition to review the order of the conciliation commissioner entered by the conciliation commissioner on August 13, 1940, which became final on November 28, 1940.

8. The District Court erred in refusing to consider the rule upon the petition to review the three orders of the conciliation commissioner entered by the conciliation commissioner on September 7, 1940, which three orders became final on September 30, 1940.

9. The District Court erred in holding that the period allowed for seeking review of a conciliation commissioner's order in the farmer debtor proceedings limits the time within which application to said conciliation commissioner may be made for a rehearing and a reconsideration thereof.

10. The District Court erred in holding that a conciliation commissioner in farmer debtor proceedings may

not consider or entertain an application for reconsideration and rehearing of an order if said application be made more than ten days after the entry of said order.

11. The District Court erred in refusing to hold that a conciliation commissioner in former debtor proceedings may consider and entertain an application to reconsider an order in an instance where such application is made more than ten days after the entry of such order.

12. The District Court erred in refusing to rule that the conciliation commissioner's order of August 13, 1940, became final for the purpose of review on November 28, 1940, by virtue of the application for rehearing of said order being considered and entertained by the conciliation commissioner, and by virtue of the conciliation commissioner's denial of the application of the objecting creditors (the appellees herein) to dismiss said application for rehearing without considering and entertaining said application for rehearing on the alleged ground that the conciliation commissioner had no jurisdiction or power to consider or entertain the said application for rehearing.

13. The District Court erred in refusing to rule that the conciliation commissioner's three orders of September 7, 1940, became final for the purpose of review on September 30, 1940, by virtue of the application for rehearing of said three orders being considered and entertained by the conciliation commissioner, and by virtue of the conciliation commissioner's denial of the application of the objecting creditors (the appellees here) to dismiss said application for rehearing without considering and entertaining said application for rehearing on the alleged ground

that the conciliation commissioner had no jurisdiction or power to consider or enter the said application for rehearing.

And on, to wit, the 12th day of February, A. D. 1941, came the Appellees by their attorneys and filed in the Clerk's office of said Court their certain Further Designation in words and figures following, to wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division. - Henry Anton Pfister, Farmer Debtor, vs. Northern Illinois Finance Corporation, Algonquin State Bank and Hartman and Son, Henry Anton Pfister, Farmer Debtor, vs. Algonquin State Bank, Northern Illinois Finance Corporation, Hartman and Son, E. C. Hook and Emil Geest. Case Number 72557. Farmer Debtor Proceedings.

**FURTHER DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.**

To: Henry Anton Pfister, Farmer Debtor, and Culver and Mendelson and Elmer McClain, his attorneys.

The Appellees, Algonquin State Bank, Northern Illinois Finance Corporation and Hartman and Son designate the following additional portions of the record and proceedings to be contained in the record on appeal of the above causes which have been consolidated by order of the District Court for the purposes of appeal.

1. Amended answer to amendment by interlineation of petition and amendment to petition for rehearing of orders of September 7th, 1940.

2. Counter-Affidavit to affidavit of U. G. Ward filed in reply to answer of Algonquin State Bank, Hartman and

Son and Northern Illinois Finance Corporation, a Delaware Corporation, which reply was filed as of September 26th, 1940.

Algonquin State Bank,

By Henry L. Cowlin,

Its Attorney

Northern Illinois Finance Corporation,

By Geo. D. Carbary,

Almore A. Teschke,

Its Attorneys.

Hartman and Son

By Emil C. Tobin,

Their Attorney.

And on, to wit, the 14th day of October, A. D. 1940, came the Algonquin State Bank et. al., by their attorneys and filed in the Clerk's office of said Court their certain Amended Answer to Amendment by Interlineation of Petition, etc., in words and figures following, to wit:

AMENDED ANSWER TO AMENDMENT BY INTER-
LINEATION OF PETITION AND AMENDMENT
TO PETITION FOR REHEARING OF
ORDERS OF SEPTEMBER 7, 1940.

Now come the Algonquin State Bank, by Henry L. Cowlin, its attorney, Hartman and Son, by Elmer C. Tobin, their attorney, and Northern Illinois Finance Corporation, a Delaware corporation, by Geo. D. Carbary and Almore H. Teschke, its attorneys; and as to the amendment by interlineation of the petition and amendment to the petition for rehearing of the orders of September 7, 1940, respectfully say:

1. That as to the amendment of Paragraph 4 on Page 3 of said petition, that they deny each and every allega-

tion thereof and say that said farmer debtor was present in person, together with his attorney of record, Robert E. Coulson, and also U. G. Ward, an attorney from Shelbyville, Illinois, on said 7th day of September, 1940, and entered into a discussion with the undersigned creditors concerning the entry of said orders of September 7, 1940, and saw and witnessed the signing by the Honorable Walter M. Givler of said orders of September 7, 1940, and fully knew the contents and conditions thereof, as will all more fully appear by the records of the said Referee and by reference to the opinion and decision of the Referee as filed under the orders of September 30, 1940, and that the statement of said farmer debtor to the contrary in said amended petition by interlineation is a falsehood.

Algonquin State Bank
Hartman and Son

Northern Illinois Finance Corporation,
a Delaware Corporation,

And on, to wit, the 14th day of October, A. D. 1940, came Almore H. Teschke and filed in the Clerk's office of said Court his certain Counter-Affidavit of U. G. Ward, in words and figures following, to wit:

COUNTER-AFFIDAVIT TO AFFIDAVIT OF U. G. WARD
FILED IN REPLY, WHICH REPLY WAS FILED
AS OF SEPTEMBER 26, 1940.

Almore H. Teschke, being first duly sworn on oath, deposes and says that he is one of the attorneys for the Northern Illinois Finance Corporation, a Delaware corporation, and that he was present at the hearing of September 7, 1940, before the Honorable Walter M. Givler, the Conciliation Commissioner of the above entitled mat-

ter, in the City of Waukegan, Lake County, Illinois; that at said hearing one U. G. Ward, an attorney from Shelbyville, Illinois, was present, together with Robert E. Coulson, as counsel for the farmer debtor, Henry Anton Pfister; that at said hearing a discussion was entered into by and between the said farmer debtor, Robert E. Coulson U. G. Ward and the Conciliation Commissioner and attorneys for the Algonquin State Bank, Hartman and Son and Northern Illinois Finance Corporation, a Delaware corporation, concerning the entry of the orders heretofore referred to as having been entered September 7, 1940; that said U. G. Ward was present at all times during the discussion concerning said orders of September 7, 1940, and was likewise present at the time that the Honorable Walter M. Givler affixed his signature to each of the three orders entered on September 7, 1940, and that he, the said U. G. Ward, was advised by the Honorable Walter M. Givler, that he was entering the orders of September 7, 1940, and further advised the said U. G. Ward that he was signing and filing the said orders and that the said orders were signed in the immediate presence of the farmer debtor, the said Robert E. Coulson and the said U. G. Ward.

Further this affiant saith not.

Almore H. Teschke.

(Duly Verified.)

In the District Court of the United States for the Northern District of Illinois, Eastern Division. In the Matter of Henry Anton Pfister, Farmer Debtor. Henry Anton Pfister, Farmer Debtor, vs. Algonquin State Bank, Northern Illinois Finance Corporation, Hartman and Son, E. C. Hook, and Emil Geest. Case No. 72557. In Farmer Debtor Proceedings. Consolidated for Purposes of Appeal.

For good cause the court hereby extends for thirty days the time for filing the record on appeal and docket-

ing the action. This order is made before the expiration of the period for filing and docketing as originally prescribed.

Holly,
Judge.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

CERTIFICATE OF MAILING.

I, Hoyt King, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 15th day of January, A. D. 1941, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

(Seal)

Hoyt King,
Clerk.

Northern District of Illinois, Eastern Division, ss.

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Designation and additional designation filed in this Court and in the office of the Conciliation Commissioner In the Matter of Henry Anton Pfister, Debtor, No. 72557, as the same appear from the original records and files thereof now remaining in my custody and control, and in the custody and control of the Files in the Conciliation Commissioner's Office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 21st day of March, A. D. 1941.

(Seal)

Hoyt King,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record filed in this Court on the thirtieth day of April, 1941, in the following entitled causes:

Cause Nos 7631, 7632.

In the Matter of

Henry Anton Pfister,

Debtor.

Henry Anton Pfister,

Appellant,

vs.

Northern Illinois Finance Corporation, *et al.*,

Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of January, A. D. 1942.

Kenneth J. Carrick,

(Seal)

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the first day of October in the year of our Lord one thousand nine hundred and forty, and of our Independence the one hundred and sixty-fifth,

In the Matter of
Henry Anton Pfister,
Debtor.

Henry Anton Pfister,
Appellant,

7631 *vs.*
Northern Illinois Finance Corpora-
tion, *et al.,*
Appellees.

Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

In the Matter of
Henry Anton Pfister,
Debtor.

Henry Anton Pfister,
Appellant,

7632 *vs.*
Northern Illinois Finance Corpora-
tion, *et al.,*
Appellees.

And, to-wit: On the twenty-fourth day of March, 1941, there was filed in the office of the Clerk of this Court an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

Appearance for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

Cause No. 7631-2.

Henry Anton Pfister, Farmer-Debtor.

The Clerk will enter our appearance as counsel for
Farmer-Debtor, Henry Anton Pfister.

Elmer McClain,
Lima Ohio.

Alvin H. Culver,
160 No. La Salle St., Chicago, Ill.

David H. Kraft,
160 No. La Salle St., Chicago, Ill.

Endorsed: Filed Mar. 24, 1941. Kenneth J. Carrick,
Clerk.

And afterwards, to-wit: On the twenty-seventh day of
March, 1941, there was filed in the office of the Clerk of
this Court, in cause No. 7631, a motion to consolidate ap-
peals, which said motion is in the words and figures fol-
lowing, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Henry Anton Pfister,
Farmer Debtor.

Henry Anton Pfister,
Appellant,

vs.

Northern Illinois Finance Corpora-
tion, Algonquin State Bank and
Hartman and Son,

Appellees.

Case No. 7631.

No. 72557 in District Court,
Northern District of Illi-
nois, Eastern Division,
Chicago.

In Farmer Debtor Pro-
ceedings.

**EMERGENCY MOTION TO CONSOLIDATE
APPEALS.**

The said Henry Anton Pfister, appellant, represents to the court that:

1. On December 16, 1940, the District Court dismissed his petition for review of a certain order of Honorable Walter M. Givler, conciliation commissioner, which order was entered August 13, 1940.

On the same day, December 16, 1940, the District Court dismissed his petition for review of a certain other order of the said conciliation commissioner which order was entered September 30, 1940.

2. On December 30, 1940, he filed in the District Court his motions to vacate said orders of December 16, 1940, and to reconsider said petitions for review which motions were continued to January 13, 1941, for hearing.

3. On January 13, 1941, said motions were heard by the District Court.

4. On January 14, 1941, said motions were denied by the District Court.

5. On January 14, 1941, he duly took an appeal from the denial of each of said petitions for review by filing with the District Court a notice of appeal.

6. The grounds for dismissal of said petitions for review were identical, involving a common question of law, namely whether applications for rehearings of certain or-

ders entered by said conciliation commissioner which were the subjects of said petitions for review were timely filed. The District Court held that said applications were not timely filed.

By order of said District Court below, from which the appeals herein have been taken, entered January 20, 1941, upon application by the appellant after due notice to the appellees, the District Court below consolidated the said two appeals which were taken respectively on January 14, 1941, from the orders of the District Court entered respectively on December 16, 1940.

Wherefore in order that there may be no question as to the consolidation of said appeals the said appellant applies to the court for an order consolidating said appeals for the purpose of avoiding unnecessary costs and delays and saving time and effort in the administration of justice.

This application is based upon U. S. C., Title 28, Section 734:

When causes of like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may invoke such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delays in the administration of justice, and may consolidate said causes when it appears reasonable to do so.

Also Rule 42 (a) of the Rules of Civil Procedure:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Henry Anton Pfister,
By Ekmer McClain and
Culver and Mendelson,
His Attorneys.

Endorsed: Filed Mar. 27, 1941. Kenneth J. Carrick,
Clerk.

And on the same day, to-wit: On the twenty-seventh day of March, 1941, there was filed in the office of the Clerk of this Court, in cause No. 7632, a motion to consolidate appeals, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of
Henry Anton Pfister,
Farmer Debtor.

Henry Anton Pfister,
Appellant,

vs..

Algonquin State Bank, Northern
Illinois Finance Corporation,
Hartman and Son, E. C. Hook
and Emil Geest,

Appellees.

Case No. 7632.
No. 12557 in District Court,
Northern District of Illi-
nois, Eastern Division,
Chicago.
In Farmer Debtor Pro-
ceedings.

EMERGENCY MOTION TO CONSOLIDATE
APPEALS.

The said Henry Anton Pfister, Appellant, represents to the court that:

1. On December 16, 1940, the District Court dismissed his petition for review of a certain order of Honorable Walter M. Givler, conciliation commissioner, which order was entered August 13, 1940.

On the same day, December 16, 1940, the District Court dismissed his petition for review of a certain other order of the said conciliation commissioner which order was entered September 30, 1940.

2. On December 30, 1940, he filed in the District Court his motions to vacate said orders of December 16, 1940, and to reconsider said petitions for review which motions were continued to January 13, 1941, for hearing.

3. On January 13, 1941, said motions were heard by the District Court.

4. On January 14, 1941, said motions were denied by the District Court.

5. On January 14, 1941, he duly took an appeal from

the denial of each of said petitions for review by filing with the District Court a notice of appeal.

6. The grounds for dismissal of said petitions for review were identical, involving a common question of law, namely whether applications for rehearings of certain orders entered by said conciliation commissioner which were the subjects of said petitions for review were timely filed. The District Court held that said applications were not timely filed.

By order of said District Court below, from which the appeals herein have been taken, entered January 20, 1941, upon application by the appellant after due notice to the appellees, the District Court below consolidated the said two appeals which were taken respectively on January 14, 1941, from the orders of the District Court entered respectively on December 16, 1940.

Wherefore in order that there may be no question as to the consolidation of said appeals the said appellant applies to the court for an order consolidating said appeals for the purpose of avoiding unnecessary costs and delays and saving time and effort in the administration of justice.

This application is based upon U. S. C., Title 28, Section 734:

When causes of like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may invoke such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delays in the administration of justice, and may consolidate said causes when it appears reasonable to do so.

Also Rule 42 (a) of the Rules of Civil Procedure:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Henry Anton Pfister,
By Elmer McClain and
Culver and Mendelson,
His Attorneys.

Endorsed: Filed Mar. 27, 1941. Kenneth J. Carrick,
Clerk.

And afterwards, to-wit: On the twenty-ninth day of March, 1941, there was filed in the office of the Clerk of this Court, in cause No. 7632, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 7632.

In the Matter of

Henry Anton Pfister,

Debtor,

The Clerk will enter the appearance as counsel for E. C. Hock.

John V. Mooradian,

4 So. Genesee St., Waukegan, Ill.

Joseph N. Sikes,

4 So. Genesee St., Waukegan, Ill.

Endorsed: Filed Mar. 29, 1941. Kenneth J. Carrick,
Clerk.

And on the same day, to-wit: On the twenty-eighth day of March, 1941, the following further proceedings were had and entered of record, to-wit:

Friday, March 28, 1941.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

In the Matter of

Henry Anton Pfister,

Debtor.

Henry Anton Pfister,

7631

7632

vs.

Northern Illinois Finance Corpo-
ration, *et al.*,

Appellant,
Appellees.

} Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

On motion of counsel for appellant, it is ordered that these appeals be, and they are hereby, consolidated.

And afterwards, to-wit: On the third day of July, 1941, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 7631-7632.

Henry Anton Pfister,

Appellant,

vs.

Northern Illinois Finance Co., *et al.*,

Appellees.

The Clerk will enter appearance as counsel for

Elmer C. Tobin,
506 Professional Bldg., Elgin, Ill.

George S. Carbary,
100 E. Chicago St., Elgin, Ill.

Elmore H. Teschke,
100 E. Chicago St., Elkin Ill.

Henry L. Cowlin,
Crystal Lake, Ill.

Endorsed: Filed July 3, 1941. Kenneth J. Carrick,
Clerk.

And afterwards, to-wit: On the sixteenth day of October, 1941, the following further proceedings were had and entered of record, to-wit:

Thursday, October 16, 1941.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Hon. William M. Sparks, Circuit Judge.

Hon. Otto Kerner, Circuit Judge.

In the Matter of

Henry Anton Pfister,
Debtor.

7631 Henry Anton Pfister, *Appellant*,
7632 *vs.*
Northern Illinois Finance Corporation, *et al.*,
Appellees.

Appeals from the District
Court of the United
States for the Northern
District of Illinois, Eastern
Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel; and on the motion of counsel for appellees to strike appellant's reply brief, and on oral argument by Mr. Elmer McClain, Counsel for appellant, and by Messrs. John V. Mooradian and Elmer C. Tobin, counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the tenth day of November, 1941, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit..

Nos. 7631 and 7632.

October Term and Session, 1941.

In the Matter of

HENRY ANTON PFISTER,

Debtor..

HENRY ANTON PFISTER,

Appellant.

vs.

**NORTHERN ILLINOIS FINANCE
CORPORATION, et al.,**

Appellees.

Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

November 10, 1941.

Before EVANS, SPARKS and KERNER, *Circuit Judges.*

SPARKS, *Circuit Judge.* On February 28, 1940, appellant filed his petition as a farmer-debtor for composition or extension of his debts under section 75 of the Bankruptcy Act. His creditors did not accept his proposal, hence, on July 19, 1940, the debtor filed his amended petition under section 75(s) seeking a moratorium. This amended petition was referred to the conciliation commissioner on July 20, 1940, who thereafter acted as referee under subsection (s)(4).

Thereafter this referee entered four orders, one on August 13, 1940, and three on September 7, 1940. The first fixed the rental and principal payments to be made by the debtor. The other orders related to the sale of what was termed perishable property. The farmer-debtor did not appeal or file a petition for review from any of these orders within the ten-day period required by section 39(c) of the Bankruptcy Act, 11 U. S. C. A. section 67. After

this ten-day period had elapsed, appellant filed with the referee his two petitions for rehearing. His petition for rehearing of the order of August 13, 1940, was filed on September 16, 1940. His petition for rehearing of the orders of September 7, 1940, was filed on September 20 of that year. On September 30, 1940, the referee denied the petition for rehearing of the orders of September 7; and on November 28, 1940, he denied the petition for rehearing of the order of August 13, 1940. On October 9, 1940, the debtor filed his petition for review of the three orders of September 7; and on November 28, 1940, he filed his petition for review of the order of August 13, 1940. These petitions were dismissed by the District Court on December 16, 1940, on the ground that it did not have jurisdiction to hear them. On December 30, 1940, the debtor filed his motion in the District Court to vacate the orders of December 16, 1940. This motion was denied by the District Court on January 14, 1941.

From the orders of the District Court of December 16, 1940, and the order entered January 14, 1941, denying a reconsideration of the December 16 orders, the appellant-debtor filed notices of appeal to this court on January 14. The appeals were consolidated for hearing.

Appellant first contends that section 75(s)¹ and not section 39(c)² governs appeals and reviews in farmer-debtor cases.

1. Section 75(s).. "Any farmer failing to obtain the acceptance . . . (of the proposed composition or extension) if he feels aggrieved . . . (thereby) may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may . . . petition the court that all of his property . . . be appraised, and that his unencumbered exemptions . . . be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee . . . shall designate and appoint appraisers, . . . Such appraisers shall appraise all of the property of the debtor . . . at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *PROVIDED*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

2. 39(c). "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. . . ."

We think these appeals are governed by section 39(c). It is noted that this section deals exclusively with the review of referee's orders by the district judge, while the proviso of section 75(s) deals, not with petitions to review such orders, but with appeals, and the objections and exceptions upon which those appeals are based. This subsection deals only with the debtor's right to a moratorium, and the appraisal of his property for that purpose. It provides that such appraisals shall be made in all other respects, with rights of objections, exceptions and appeals, in accordance with this Act. Then follows the proviso that in proceedings under *this* section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal. The debtor construes the words "this section" to mean the entire section 75 with all of its many subsections, thereby rendering section 39(c) nugatory as to all matters within the purview of section 75, including the sentence next preceding the proviso in subsection (s). Such construction, however, would impute to Congress an intention with which we think it should not be charged. For instance, if the orders here complained of had been entered more than four months after the referee had approved the appraisals, then, under the debtor's construction he would have lost all right of review, or appeal.

We think it can not be said that Congress intended that section 75 should contain all procedural limitations on matters arising under the Act. See section 75 (n); General Order 50 (11) of the General Orders in Bankruptcy, 305 U. S. 677, 711.

There seems to be no doubt that Congress enacted 39(c) in order to expedite all matters within the purview of the Bankruptcy Act, and its kindred relief amendments. It has served this purpose exceedingly well, and especially is this true with respect to claims which have more or less a nuisance value. Our experience is that the debtor has benefited more often and in a greater degree by the provisions of this section than have the creditors, and we see no reason why the plain language of this very useful enactment should now be stricken down by judicial construction. Our duty is to so construe both sections, if reasonably possible, that both may be effective. This can be done by construing the word "section" in the first paragraph of section 75(s) to refer only to the part of that paragraph

which precedes the proviso, and we thus construe it. The orders here complained of did not arise under this paragraph, but were entered in the course of hearings authorized under section 75(s)(4). Hence we think section 39(c) is controlling here.

In support of the debtor's contention he relies on *Benitez v. Bank of Nova Scotia*, 313 U. S. 270. That case merely held that the status of farmer for the purposes of proceedings under section 75 of the Bankruptcy Act must be tested by the definition of the word farmer in that section rather than by the one in section 1(17) of the Chandler Act. We think this case in no manner supports appellant's contention.

Appellant further contends that if section 39(c) is controlling, his petitions for review were filed in time. His argument in this respect is that his petitions for rehearing stopped the running of time for seeking review; that the finality of the orders of August 13, 1940, and September 7, 1940, was in each instance expunged by a petition for rehearing which he says was seasonably filed, entertained, and denied by the conciliation commissioner.

In support of this contention he relies upon *Bowman v. Loperena*, 311 U. S. 262; *Wayne Gas Co. v. Owens-Illinois Co.*, 300 U. S. 131; *United States v. Seminole*, 299 U. S. 417, and analogous cases. The facts in these cases are to be distinguished from those of the case at bar in that the petitions for rehearing were granted, the old judgment was vacated, and a new judgment entered after a rehearing on the merits (as in *Wayne Co. v. Owens-Illinois Co.*, *supra*), or on the ground that the petitions for rehearing were filed within the time provided for appeal, and the order complained of had never become final until the disposal of the petition (as in *Bowman v. Loperena*, *supra*). In the present case the petitions for rehearing were not filed within the time allowed for appeal, and each was denied.

Under these facts we are convinced that appellant's contention in this respect cannot prevail. In *Wayne Co. v. Owens-Illinois Co.*, the Court said: "The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited

for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. • • •

On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry." In that case the petition for rehearing was granted, and of course the court reheard the matter and rendered another decree. However, in this case, the rehearing was not had or granted. Another distinguishing feature is that it is quite apparent from the record here that appellant's petition for rehearing was filed merely for the purpose of reviving and extending the time for filing a petition for review, under which state of facts the Court in the Wayne case said an appeal should be dismissed. The leading case on this subject seems to be *Conboy v. First National Bank*, 203 U. S. 141, where the question is fully discussed. This case has been followed in *C. M. & St. P. R. R. Co. v. Leverentz*, 19 F. 2d 915; and *Chapman v. Federal Land Bank*, 117 F. 2d 321. We find no rulings of the Supreme Court contrary to the principles set forth in these decisions.

Furthermore, the three orders of September 7 appear from the record to be consent orders, and of course no right of appeal exists in appellant with respect to them.

However, on September 19, 1940, appellant caused to be filed with the District Court an affidavit of J. E. Dazey, stating that the affiant was then and had been for twenty-five years last past a licensed attorney, and that he was the attorney for the debtor in this bankruptcy proceeding; that he became ill on or about the twenty-first day of May, 1940, with high blood pressure which resulted in apoplexy, and that from that time since he had not been able to attend to any case in court; that on the filing of this bankruptcy proceeding he obtained the services of one Robert E. Coulson, an attorney of Waukegan, Illinois, but at no time authorized him to take any steps in this case, except

to file papers prepared by affiant and mailed to Coulson, and up and until the seventh instant affiant did not know that Coulson had made any stipulations or filed any papers of any kind or character in reference to the case at bar.

This record discloses that Coulson was an attorney of record for the farmer-debtor. He attended all hearings in this matter before the commissioner, and signed the amended petition for the debtor. He was present in court on July 25, 1940, and made a motion to set for hearing on August 13, 1940, all matters, including the petitions of appellees. On that date at the hearing on the petitions on which these orders complained of were entered, appellees had their witnesses in court and were about to proceed with their proof when Coulson voluntarily waived such proof and without solicitation from these appellees voluntarily entered into the following stipulation of record: "Hearing on Reclamation Petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank that the personal property described in the petition is perishable within the meaning of paragraph No. 2, SubSec. S. of Sec. 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by debtor as exempted property."

After this stipulation was made of record, the petitions and proceedings were continued for a period of twenty days. On September 7, the debtor and additional counsel appeared at the hearing. The orders complained of were then entered in the presence of the debtor's two lawyers and himself. The debtor only attended two of the hearings had before the commissioner, and his chief counsel, Mr. Dazey, never appeared, and the condition of Mr. Dazey's health was first called to the commissioner's attention by the debtor's petition filed on September 20, 1940, by an entirely different counsel of Lima, Ohio. He is still appearing for the debtor.

Admitting the truth of the debtor's showing in this respect, it furnishes no basis for the court to rule differently than was done in this case. The District Court followed the Statute and it had no power to do otherwise. The critical condition of the debtor's counsel is to be deplored, but this alone will not excuse the negligence of the debtor in failing to inform the court of his attorney's

condition. The debtor was not an ignorant man, for at one time he had been president of the Pure Milk Association of the Chicago area. We are not here confronted with an exercise of the court's discretion, and if we were we could not under these facts state that the court abused it. See *Curry v. Curry*, 79 F. 2d 172; *Bergman v. Rhodes*, 334 Ill. 137; *Union Central Life Ins. Co. v. Anderson*, 291 Ill. App. 423. We hold that the petitions for review were not filed in time. This being the case we are not called upon to pass upon the other questions raised.

The decree is affirmed.

Endorsed: Filed Nov. 10, 1941. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the tenth day of November, 1941, the following further proceedings were had and entered of record, to-wit:

Monday, November 10, 1941.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

In the Matter of
Henry Anton Pfister,
Debtor.

Henry Anton Pfister,
Appellant.

7631 vs.
Northern Illinois Finance Corpo-
ration, et al.,
Appellees.

Appeal from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order or judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs.

In the Matter of
Henry Anton Pfister,
Debtor.

Henry Anton Pfister,
Appellant,

7632 vs.
Northern Illinois Finance Corpo-
ration, et al.,
Appellees.

Appeal from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order or judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the twenty-first day of November, 1941, there was filed in the office of the Clerk of this Court, a motion for extension of time to file petition for a rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of

Henry Anton Pfister,
Farmer Debtor.

Henry Anton Pfister,
Appellant,

vs.

Northern Ill. Finance Corpora-
tion, *et al.*,

Appellees.

Nos. 7631 and 7632 Con-
solidated.

Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

MOTION FOR EXTENSION OF TIME TO FILE PETI-
TION FOR REHEARING.

On November 18, 1941, there was forwarded to the legal printers for printing a Petition for Rehearing. It is expected that said Petition for Rehearing will be printed and filed by November 25, 1941, the date the fifteen day limit for filing such petition expires, but to cover any unforeseen contingency that might arise to prevent said petition being filed by November 25, 1941, it is requested that the court grant an extension of ten days or until December 4, 1941, within which to file said petition for rehearing.

Respectfully submitted,

Elmer McClain, *

By Leon N. Stone,

*Attorney for Henry Anton
Pfister, Farmer Debtor.*

United States of America, }
 County of Allen, } ss.
 State of Ohio, }

Leon N. Stone, being duly sworn, says that the statements in the foregoing motion for extension of time to file petition for rehearing are true.

Leon N. Stone,

Sworn to before me and in my presence subscribed this 19th day of November, 1941.

Sylvan H. Wise,

(Notary Seal)

State of Ohio Notary Public.

Notice of Filing of Motion for Extension of Time to File

Petition for Rehearing.

To Joseph N. Sikes, Esq., and John V. Mooradian, Esq., attorneys for E. C. Hook; Henry L. Cowlin, Esq., attorney for The Algonquin State Bank; Elmer C. Tobin, Esq., attorney for Hartman and Son; and Almore H. Teschke, Esq., attorney for Northern Illinois Finance Company:

Notice is hereby given that on November 19, 1941, there was forwarded to the United States Circuit Court of Appeals for the Seventh Circuit, one original and four copies of the foregoing motion for extension of time.

Elmer McClain,

Attorney for Henry Anton Pfister, Farmer Debtor.

Leon N. Stone,

By Leon N. Stone,

Associate, Attorney.

Proof of Service.

A copy of the foregoing motion for extension of time has been mailed postage paid to Joseph N. Sikes, Esq., and John V. Mooradian, Esq., 4 South Genesee Street, Waukegan, Illinois, attorneys for E. C. Hook; Henry L. Cowlin, Esq., Crystal Lake, Illinois, attorney for The Algonquin State Bank; Elmer C. Tobin, Esq., Elgin, Illi-

nois, attorney for Hartman and Son; and Almore H. Teschke, Esq., 100 East Chicago Street, Elgin, Illinois, attorney for the Northern Illinois Finance Company.

Elmer McClain,

*Attorney for Henry Anton
Pfister, Farmer Debtor.*

Leon N. Stone,

By Leon N. Stone,
Associate, Attorney.

Endorsed: Filed No. 21, 1941. Kenneth J. Carrick,
Clerk.

And afterwards, to-wit: On the twenty-fourth day of November, 1941, the following further proceedings were had and entered of record, to-wit:

Monday, November 24, 1941.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

In the Matter of
Henry Anton Pfister,
Debtor.

7631 Henry Anton Pfister,
7632 *Appellant,*
vs.
Northern Illinois Finance Corpo-
ration, *et al.,*
Appellees.

} Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

On motion of counsel for appellant, it is ordered that the time within which to file a petition for rehearing herein be, and it is hereby, extended until December 4, 1941.

And on the same day, to-wit: On the twenty-fourth day of November, 1941, there was filed in the office of the Clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

Order Denying Rehearing.

And afterwards, to-wit: On the fourth day of December, 1941, there was filed in the office of the Clerk of this Court, an answer to petition for a rehearing, which said answer is not copied here.

And afterwards, to wit: On the sixth day of December, 1941, the following further proceedings were had and entered of record, to-wit:

Saturday, December 6, 1941.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

In the Matter of

Henry Anton Pfister,
Debtor.

Henry Anton Pfister,
Appellant,

7631, 7632 vs.
Northern Illinois Finance Corpora-
tion, et al.,
Appellees.

Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

It is ordered by the Court that the petition for a rehearing of these causes be, and it is hereby, denied.

And afterwards, to-wit: On the ninth day of December, 1941, there was filed in the office of the Clerk of this Court, a motion to stay mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

| | | |
|---|---|---|
| Henry Anton Pfister, Farmer Debtor-Appellant, vs. Northern Illinois Finance Corpora- tion, et al., Mortgagees-Appellees. | } | Cases No. 7631 and No. 7632. Consolidated by order of the District Court and by the order of this Ap- pellate Court. |
|---|---|---|

NOTICE AND MOTION TO STAY MANDATE.

The appellant, Henry Anton Pfister, gives notice that he will file in the Supreme Court of the United States a petition for certiorari and he moves the court that the issuance of the mandate herein be stayed pending the disposition by the Supreme Court of his petition for certiorari.

Henry Anton Pfister.

By Elmer McClain,

Attorney for the Appellant,
Henry Anton Pfister.

Lima, Ohio
December 8, 1941.

Proof of Service.

I certify that prior to the filing of the foregoing notice and motion I served upon the appellees a copy of said document by mailing it postage paid to their attorneys of record, namely:

Mr. Elmer C. Tobin,
Elgin, Illinois;
Mr. Joseph N. Sikes,
Waukegan, Illinois;
Mr. John V. Mooradian,
Waukegan, Illinois;
Messrs. Peden & Overholzer,
Libertyville, Illinois;
Mr. Henry L. Cowlin,
Crystal Lake, Illinois;
Mr. George D. Carbary,
Elgin, Illinois;
Mr. Almore Teschke,
Elgin, Illinois.
Elmer McClain,
Attorney for the Appellant.

United States of America }
 Northern District of Ohio }
 County of Allen:

Elmer McClain, being first duly sworn this 8th day of December, 1941, says that the foregoing statements are true as he verily believes.

Henry W. Neff,
Notary Public.

(Seal)

My Commission Expires Mar. 6, 1942.

Endorsed: Filed Dec. 9, 1941. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the tenth day of December, 1941, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 10, 1941.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

In the Matter of
 Henry Anton Pfister,
 Debtor.

Henry Anton Pfister,
Appellant,

7631; 7632 vs.
 Northern Illinois Finance Corpora-
 tion, *et al.*,

Appellees.

Appeals from the District
 Court of the United
 States for the Northern
 District of Illinois, East-
 ern Division.

On motion of counsel for appellant, it is ordered that the mandates of this Court in this cause be, and they are hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the twenty-ninth day of December, 1941, there was filed in the office of the Clerk of this Court, an emergency motion to further stay mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

Henry Anton Pfister,
Appellant,
vs.
Northern Illinois Finance
Company, *et al.,*
Appellees.

Case Nos. 7631
and 7632.

EMERGENCY MOTION TO FURTHER STAY
MANDATE.

The petition for rehearing was denied December 6, 1941, and the mandate was stayed by an order of this court under its Rule 25 for a period expiring January 5, 1942, pending application to the Supreme Court for a writ of certiorari. The appellant applies for an extension of the stay of the mandate to and including February 14, 1942, for the following reasons:

Counsel for the appellant finds that he will be unable to prepare, have printed and file such petition for certiorari, and brief for certiorari by January 5, 1942, because emergencies have arisen in pending legal matters in which he is engaged that make it impossible. Also counsel has pending in the Supreme Court of the United States a matter requiring the preparation of a brief for argument during the first or second full week of January 1942 and must be present in court the first week. Other matters will require his attention in the East until January 17, 1942. Counsel will be unable to prepare such petition and brief in this matter until after January 17, 1942, and as the questions to be presented are new some time for study will be necessary in addition to the actual writing of the petition and brief and their printing.

Said extension is not applied for as a matter of convenience but of necessity. When the thirty day stay was entered, counsel for the appellant believed it possible to file a petition and brief within that period but unforeseen developments have made it impossible.

Henry Anton Pfister.

By Elmer McClain,

His Counsel.

United States of America }
Northern District of Ohio } ss.
County of Allen,

Elmer McClain being duly sworn, says the statements in the foregoing application are true as he verily believes.

Elmer McClain.

Sworn to before me and in my presence subscribed this 26th day of December, 1941.

Henry W. Neff,
Notary Public.

(Seal)

My Commission Expires Mar. 6, 1942.

To the Clerk, United States Circuit Court of Appeals for the Seventh Circuit, Chicago, Illinois:

Please tender the attached Emergency Motion at once to the court pursuant to Rule 19 and notify counsel for the appellant and counsel for the appellees of the manner and date of submission. Counsel for the appellant will be absent from his office from January 3 to January 17, 1942, and desires to have opportunity to reply to any objection entered by the appellees and to know the action of the court upon this motion before January 17, 1942.

Proof of Service.

Copies of the attached Emergency Motion and the following notice have been served upon counsel for the appellees prior to its filing.

Notice.

To Counsel for the Appellees, namely:

Joseph N. Sikes, Esq., and
John V. Mooradian, Esq.,
4 South Genesee Street,
Waukegan, Illinois;
Henry C. Cowlin, Esq.,
Crystal Lake, Illinois;
Elmer C. Tobin, Esq.,
Professional Building,
Elgin, Illinois;
Almore H. Teschke, Esq.,
100 East Chicago Street,
Elgin, Illinois;
Peden & Overholser,
139 North Clark Street,
Chicago, Illinois.

Please take notice that the appellant has forwarded the within Emergency Motion to the clerk of the Circuit Court of Appeals for the Seventh Circuit for tender and submission pursuant to Rule 19 of the court.

Henry Anton Pfister.

By Elmer McClain,

His Counsel.

Dated: December 26, 1941.

Endorsed: Filed Dec. 29, 1941. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the thirtieth day of December, 1941, there was filed in the office of the Clerk of this Court, an answer to motion for further stay of mandate, which said answer is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Henry Anton Pfister,
Appellant,

vs.

Northern Illinois Finance Corporation, *et al.*,

Appellees.

Case No. 7632.

ANSWER TO MOTION FOR FURTHER STAY OF
MANDATE.

Now comes the Northern Illinois Finance Corporation and Arthur Hartman and Harvey Hartman, co-partners, doing business as Hartman and Son, by their respective attorneys, and hereby resist the above and foregoing emergency motion, and as reasons therefor say:

1. That the property representing the security of these respective appellees consists principally of dairy cattle which under stipulation of the appellant (Rec. page 10) and under finding of the conciliation commissioner (Hartman and Son order, Rec. 77 @ 78; Northern Illinois Finance Corporation order, Rec. 82 @ 85) are found to be perishable property, and were under said stipulation and findings

ordered sold as such in accordance with the provisions of the Act;

2. That these orders have been sustained by the District Court for the Northern District of Illinois, Eastern Division, (Rec. pages 176 and 179) and by order of this Court entered herein on the 10th day of November confirmed;

3. That said property, on the day of said orders, was not of sufficient value to pay the amount of the respective claims of these appellees and the Algonquin State Bank, also one of the appellees herein;

4. That each and every day said cattle continue in said dairy further depreciates their value;

5. That the appellant herein is not financially able to respond in damages to an adverse judgment herein and that no bond other than a cost bond has been filed by him in this cause;

6. That the original proceedings herein were filed by the appellant on February 28, 1940; that on June 29, 1940, the Referee in Bankruptcy ordered the appellant to account to the Court for all moneys received by him from the sale of his personal property, including milk, which the appellant has refused and still refuses to do; that the stipulation of the appellant, heretofore referred to, stipulating that the property securing the claims of these appellees is perishable was made on the 30th day of August, 1940, and an order entered thereon on the 7th day of September, A. D. 1940, more than one year ago, during all of which time said order has been pending without the filing of any bond herein by the appellant to secure these appellees from loss through the use of the chattels of these appellees by the appellant, during which time the said appellant has been deriving a steady income through the milk obtained from the dairy cattle constituting the security of these appellees;

7. That the opinion of this Court herein was filed on the 10th day of November, 1941; that the issues involved in this case are not new and are the same as presented to this Court heretofore and are comparatively simple; that sufficient time has elapsed since the denying of the petition for rehearing herein for said appellant to file any and all briefs or petitions necessary to appellant, and that further stay of mandate in this matter is unwarranted and sought merely for the purpose of delaying the issuance thereof so that appellant may procure additional revenue to fur-

ther prosecute said cause, thereby further diminishing the rights of the-appellees herein.

Wherefore, the undersigned appellees respectfully request that the motion for further stay of mandate to and including the 14th day of February, A. D. 1942, be denied and that mandate of this Court issue forthwith.

Dated at Elgin, Kane County, Illinois, this 29th day of December, A. D. 1941.

Northern Illinois Finance Corporation,

Appellee,

By Geo. D. Carbary,
Almore H. Teschke,

Its Attorneys.

Arthur Hartman and Harvey
Hartman, co-partners, doing
business as Hartman and Son,

Appellee,

By Elmer C. Tobin,
Their Attorney.

State of Illinois, }
County of Kane. } ss.

Elmer C. Tobin and Almore H. Teschke, being first duly sworn upon their oath, depose and say that they are counsel for the respective appellees above named; that they have read the above and foregoing answer by them as such counsel subscribed, and state the facts therein contained are true as they verily believe,

Elmer C. Tobin,
Almore H. Teschke.

Subscribed and sworn to before me this 29th day of December, A. D. 1941.

E. L. Peckman,
Notary Public.

(Seal)

Endorsed: Filed Dec. 30, 1941. Kenneth J. Carrick,
Clerk.

And on the same day, to-wit: On the thirtieth day of December, 1941, there was filed in the office of the Clerk of this Court, a reply to answer of appellees to motion to further stay mandate, which said reply is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

| | |
|--|---|
| Henry Anton Pfister, | } |
| <i>Appellant,</i> | |
| <i>vs.</i> | |
| Northern Illinois Finance Corporation, <i>et al.</i> , | |
| <i>Appellees.</i> | } |

REPLY TO ANSWER OF APPELLEES.

Filed December 30, 1941.

On Motion to Further Stay the Mandate.

Counsel for the appellant says that his application for a further stay of the mandate beyond the normal thirty day period is not, as stated by the appellees, "sought merely for the purpose of delaying". Prior to the argument before this Court the Appellees sought and obtained for their counsel a delay of two months in filing their briefs, without objection from the Appellant.

The reason counsel has been compelled to seek a further stay of the mandate is that this Court deried Appellants petition for rehearing sooner than he had expected. Just prior to the receipt of notice that the petition for rehearing was denied, counsel for this Appellant was retained in an appeal case in a federal court involving a very large number of exhibits, some of which consisted of old style letter files containing hundreds of papers in each of them. Said case involved many questions requiring immediate attention. In addition counsel was engaged in preparing a brief and argument in a United States Supreme Court Case, which with other business will take his time from January 3 to 17, 1941.

Further, contrary to the statement of the Appellees, the District Court did not sustain the orders of the Conciliation Commissioner but held that it did not have jurisdiction to review them, and was sustained by this court. New issues are thereby raised which have not been decided by the Supreme Court. Said issues relate both to procedure and to substantive law, both of which are new.

The order referred to by the Appellees in their paragraph numbered 6 is not involved in this appeal. It is an order issued in clear violation of law and is the subject of a petition for review which has long been on file without further action by the Court with which it was filed.

The allegation of the Appellees that the Appellant seeks delay to procure sufficient revenue to prosecute his application for certiorari is absolutely false and without foundation. This application for a further stay of the mandate originated with counsel and without the knowledge of the Appellant who never made any suggestion to counsel that he desired delay. The reasons for seeking a further stay are exactly as stated in the application therefor and in this reply. Although counsel intended and expected to have the record, petition and brief filed in the Supreme Court within 30 days it has been a physical impossibility for counsel to accomplish.

Counsel further states that his legal associate who assists him was required to be away for military medical examination, which further impeded counsel's efforts to accomplish his legal work.

Chicago, Illinois,
December 30, 1941.

Elmer McClain,
Counsel for the Appellant.

State of Illinois, }
Cook County. } ss.

Elmer McClain being duly sworn says the statements made in the foregoing reply are true as he verily believes.
Elmer McClain.

Sworn to before me and in my presence subscribed December 30, 1941.
(Seal) Notary Public.

Proof of Service.

At the filing hereof copies were mailed to counsel who have entered their appearance on behalf of the Appellees.
Elmer McClain,
Counsel for Appellant.

Endorsed: Filed Dec. 30, 1941. Kenneth J. Carrick,
Clerk.

And afterwards, to-wit: On the thirty-first day of December, 1941, there was filed in the office of the Clerk of this Court, an answer to motion for further stay of mandate, which said answer is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

| | |
|--|-------------------------------|
| Henry Anton Pfister, | } Case Nos. 7631 and 7632. |
| <i>Appellant,</i> | |
| vs. | |
| Northern Illinois Finance Corporation, <i>et al.</i> , | |
| <i>Appellees.</i> | |

ANSWER.

Now come the appellees in the above entitled cause, by their respective attorneys, and file this their answer to appellant's motion to further stay mandate in the above case pending application to the Supreme Court for a writ.

of certiorari, and respectfully ask that such application for further stay of mandate be denied for the following reasons:

1. That this farmer debtor proceedings was commenced on February 28, 1940; that on August 13, 1940 an order was duly entered providing for the payment of rental for the real estate and personal property by the appellant, the farmer debtor herein; that no rent or any monies have been paid by said debtor for the use and occupation of the lands and personal property up until the present time; that penalties on back taxes have accrued to a considerable amount and further taxes are accruing against the real estate; and considerable harm will be done to the appellees herein if this appeal is delayed as is sought by the appellant herein.

2. The only substantial security for the payment of the claims of the appellees, Algonquin State Bank, Hartman & Sons, and Northern Illinois Finance Corporation, is the livestock of the farmer debtor; that the value of such livestock depreciates from day to day and the frequent delays during the pendency of this appeal has already depreciated this livestock, causing loss to said appellees and continued and further delays in connection with this appeal will cause further and additional loss which cannot be redeemed. An examination of the appellant's motion will disclose mere conclusions and nothing contained therein justifies a necessity for additional time for stay of mandate in order to make the application sought.

3. These appellees, by their respective attorneys, in the alternative, move that in the event a further stay of mandate is granted by the Court herein, that the said appellant, Henry Anton Pfister, be required to give bond to these appellees in the amount of \$4000, with good and sufficient surety to be approved by the Court, conditioned in substance as follows: "That if the said Henry Anton Pfister fails to make application for the writ of certiorari within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the appellees, or any one or more of them, may sustain by reason of the stay, and that said Henry Anton Pfister shall answer for damages sufficient in an amount to recover the value for the use and detention of the property, real and personal, by the farmer debtor during the pendency of the appeal", all pursuant to Sec-

tion 350, United States Code Annotated, Title #28, and in accordance with the statutes in such case made and provided.

Elmer C. Tobin,
Elgin, Illinois,
*Counsel for Appellee, Hartmann
& Sons.*

John V. Mooradian,
Waukegan, Illinois,
Counsel for Appellee, E. C. Hook.

Peden & Overholser,
Libertyville, Illinois,
Counsel for Appellee, Emil Geest.

Henry L. Cowlin,
Crystal Lake, Illinois,
*Counsel for Appellee, Algonquin
State Bank.*

George D. Carbary and
Almore Teschke,
Elgin, Illinois,
*Counsel for Appellee, Northern
Illinois Finance Corporation.*

Endorsed: Filed Dec. 31, 1941: Kenneth J. Carriek,
Clerk.

And on the same day, to-wit: On the thirty-first day of December, 1941, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 31, 1941.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

In the Matter of
Henry Anton Pfister,
Debtor.

7631 Henry Anton Pfister,
7632 *Appellant*,
vs.
Northern Illinois Finance Corpo-
ration, *et al.*,
Appellees.

Appeals from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

On motion of counsel for appellant, it is ordered that the stay of the mandate of this Court in this cause be, and it is hereby extended to and including February 14, 1942.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, motions and orders relative to briefs, motion and order relative to withdrawal of record) in the following entitled causes:

Cause Nos. 7631, 7632.

In the Matter of

In the Matter of Henry Anton Pfister, Debtor.

Henry Anton Pfister,

Appellant,

vs.

Northern Illinois Finance Corporation, *et al.*,

Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of January, A. D. 1942.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 26

ORDER ALLOWING CERTIORARI—Filed March 30, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 27

ORDER ALLOWING CERTIORARI—Filed March 30, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1336)



FILE COPY

FEB 17 1942

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1941.

No. ~~958-959~~ 26-27

HENRY ANTON PFISTER,

Petitioner,

v.

**NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HART-
MAN AND SON, E. C. HOOK, and EMIL
GEEST,**

Respondents.

PETITION AND BRIEF

**On Application for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit**

ELMER McCLAIN,
Lima, Ohio

Counsel for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1941

No.

HENRY ANTON PFISTER,

Petitioner,

v.

NORTHERN ILLINOIS FINANCE CORPORATION;
ALGONQUIN STATE BANK, HARTMAN AND SON,
E. C. HOOK, and EMIL GEEST,

Respondents.

PETITION.

**On Application for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit**

(The brief in support of this petition for certiorari begins at page 29.)

Note: All emphasis in this petition and in the accompanying brief is supplied except when otherwise stated.

A page 26, following this petition and preceding the brief which supports it, there are inserted for reference copies of applicable portions of Sections 2(10), 38, and 39a (8) and (c) and the whole of Section 75 of the Bankruptcy Act. These statutes are involved in this cause.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The Statutes Involved.

The following statutes are involved:

Section 2(10) of the Bankruptcy Act, 11 U.S.C. 11(10), which invests bankruptcy courts with jurisdiction to consider the records, findings and orders of referees in bankruptcy. Copy of the applicable portion is inserted following this petition at page 26.

Section 38 of the Bankruptcy Act, 11 U.S.C. 66, which makes the jurisdiction and all actions of a referee and all proceedings before that officer subject to a review by the judge of the bankruptcy court. Copy of the applicable portion is inserted following this petition at page 26.

Section 39(c) of the Bankruptcy Act, 11 U.S.C. 67(c), which provides for petitions for review by an aggrieved party and certificates on review. Copy of the applicable portion is inserted following this brief at page 26.

Section 75 of the Bankruptcy Act, 11 U.S.C. 203, which is the farmer debtor law. Copy of the applicable portion is inserted following this brief at page 26.

Section 75(a) of the Bankruptcy Act, 11 U.S.C. 203(a) provides for the appointment of a special referee, to be known as a conciliation commissioner, who shall administer the farmer debtor law pursuant to reference from the judge of the district court.

2. The Decisions in the Courts Below.

Two petitions for review of certain orders of a conciliation commissioner were dismissed by the district court for want of jurisdiction. Appeals from these final orders were consolidated by order of the District Court and also by order of the Circuit Court of Appeals. R. 181. R. 206. The Circuit Court of Appeals sustained the District Court. The petitioner seeks a writ of certiorari.

The opinion of the Circuit Court of Appeals is reported as *Pfister v. Northern Illinois Finance Corporation*, CCA 7, 123 Fed. (2d) 543, decided November 10, 1941. It appears in the Record at R. 209 to 215. The final orders of the Appellate Court are at R. 215 to 216.

The District Court rendered no opinion. The final orders of the District Court merely dismissed the petitions for review for want of jurisdiction. R. 173 to 178.

3. A Very Brief Outline of the Procedure in the District Court.

The following is a very brief outline of so much of the procedure in the District Court as is necessary to understand this application for certiorari.

(1) While the case was pending under Section 75(s) and when the farmer debtor's counsel, J. E. Dazey, Esq., was incapacitated from a stroke of apoplexy, the conciliation commissioner issued four certain orders out of which arose the issues here presented. They are more fully referred to at pages 5, 6, and 7 of this petition.

(2) Before any right intervened the farmer debtor filed with the conciliation commissioner petitions for rehearing which were entertained. The whole proceeding

was considered and the petitions for rehearing were denied. They are more particularly referred to at page 7 of this petition.

(3) Petitions for review were filed with the conciliation commissioner within ten days from the denial of the respective petitions for rehearing. They were also filed within four months of the approval of the appraisal. They are referred to more fully at page 8 of this petition. Section 39(c) of the Bankruptcy Act provides that petitions for review shall be filed within ten days from the entry of the order complained of. Section 75 of the Bankruptcy Act provides that in proceedings under that section, objections, exceptions and appeals may be filed and taken within four months from the approval of the appraisal.

(4) The District Court dismissed the petitions for review upon the ground that it had no jurisdiction.

4. The Petitioner and the Property Involved.

The petitioner is a dairy farmer who with his family resides upon a farm of about 80 acres in Illinois. The livestock and equipment of the dairy farm, which is operated by the petitioner and his family, consists of approximately 20 cows, 1 bull, 3 horses, 20 hogs and 130 chickens, with the usual complement of farm implements and other equipment necessary to operate it. R. 14. R. 20. R. 70 to 72. R. 91, top of page.

The petitioner invoked Section 75 (a) to (r) of the Bankruptcy Act, 11 U.S.C., Section 203, by filing his petition as a farmer debtor for composition or extension. R. 14 and 15. Failing to accomplish that endeavor, he amended his petition and applied for a three year stay and for rehabilitation pursuant to Section 75(s); 11 U.S.C., Section 203(s). R. 25.

5. The Proceedings Complained Of.

The proceedings complained of arose out of the actions of the conciliation commissioner under Section 75(s). While counsel for the farmer debtor was incapacitated from a stroke of apoplexy, the conciliation commissioner issued four orders in all, (1), he issued his order of August 13, 1940 (R. 72 to 77), and (2), he later issued a set of three orders of September 7, 1940. R. 77 to 88. The incapacity of the farmer debtor's counsel, J. E. Dazey, Esq., is described in his affidavit. R. 34 and 35. Since his incapacity occurred Mr. Dazey has not participated in the proceedings except to prepare his affidavit.

The four orders will next be described briefly.

(1) THE ORDER OF AUGUST 13, 1940 R. 72 to 77.

On August 13, 1940, at the first creditors' meeting under Section 75(s), the conciliation commissioner approved the appraisement of the farmer debtor's property and set aside his exemptions. R. 10, entries of August 13, 1940: R. 69 to 72. That day, without any preliminary notice having been given, three of the respondents moved that rent be fixed at \$6,375 for three years and that additional payments on the principal of the debts be ordered in the like sum of \$6,375, making a total of \$12,750 to be paid within three years. R. 9, entry of August 13, 1940. These motions were granted by the conciliation commissioner on the same day they were filed by ordering a total of \$12,750 to be paid by the farmer debtor within less than 2 years and 9 months. (The appraisement was:

real estate \$16,000; unexempt chattels \$1786). Rental payments were made payable semi-annually. Principal payments were made payable quarterly. The order also included a stay for a period of 2 years, 8 months, 13 days from the date of its entry. That is, the three year statutory stay was made to run, not from the entry of the stay order as the statutes requires but, from April 26, 1940, which date was more than three months preceding the entry of the order. The last payment was ordered to be made by April 26, 1943. R. 9, entry of August 13, 1940. R. 72 to 77. Section 75(s) (2). *Wright v. Union Central*, 311 U. S. 273, 275; citing: *John Hancock v. Bartels*, 308 U. S. 180 and *Borchard v. California*, 310 U. S. 311.

(2) "THE THREE ORDERS OF SEPTEMBER 7, 1940.

R. 77 to 88

The first 'creditors' meeting was adjourned to September 7, 1940, to hear petitions for reclamation of mortgaged chattels which had been presented by three of the respondents. R. 42 to 48. R. 48 to 60. R. 60 to 65. Three of these petitions were granted by three orders which were purportedly entered on that date. The word "purportedly" is used because, as will be shown in the brief in support of this petition, the record contains evidence indicating that they were not entered then. (See page 53 under heading "Sixth" of the following brief.)

These three orders ordered sold as "perishable property" the debtor's cows, bull, horses, sows, farm machinery, and his 1939 crops.

This would have left to the farmer debtor, with which to operate his 80 acre dairy farm for the remainder of the stay period, and from which to produce support for his family, the rent and the extra principal payments and also to accumulate sufficient funds to be used in redeeming his mortgaged farm and automobile, the following chattels:

| | |
|-----------------------------------|-------------------|
| his household goods appraised at | \$105.00 |
| 4 heifers appraised at | 60.00 |
| 15 pigs appraised at | 20.00 |
| 130 hens appraised at | 50.00 |
| 1 automobile appraised at | 275.00 (mortgaged |
| for its full value. R. 18. R. 71) | |

Total value\$510.00

leaving \$235 free from mortgage liens. R. 18. R. 71.

These four orders, namely (1) that of August 13, 1940, and (2) the three purportedly of September 7, 1940, are the orders complained of.

6. Petitions for Rehearing of the Conciliation Commissioner's Orders.

Before any right intervened petitions for rehearing of all of the four orders of the conciliation commissioner were presented to and entertained by him. He overruled motions by the creditors to dismiss them for want of jurisdiction to entertain them. After considering all of the proceedings, the conciliation commissioner denied both petitions for rehearing. R. 139 to 164. R. 13, first entry of November 28, 1940. R. 88 to 116. Also brief herein at page 36 and at pages 54 and 55 under heading "Seventh."

7. - Proceedings for Review of the Conciliation Commissioner's Orders.

The petition for review of the conciliation commissioner's order of August 13, 1940, and his certificate on review appear in the record at R. 165 to 173.

The petition for review of the conciliation commissioner's three orders of September 7, 1940, and his certificate on review appear in the record at R. 116 to 132.

As already stated the District Court dismissed both petitions for review for lack of jurisdiction. R. 173 to 175. R. 176 to 178.

8. Pertinent Procedural Dates.

August 13, 1940—The conciliation commissioner approved the appraisal. (Real estate \$16,000, unexempt and mortgaged chattels \$1786.00): R. 10, entry of August 13, 1940. R. 69, top of page.

August 13, 1940—Entry of order by conciliation commissioner fixing rental and additional payments at \$12,750, setting off exemptions, and staying proceedings for 2 years, 8 months, 13 days: R. 9, entry of August 13, 1940. R. 72 to 77.

September 7, 1940—Purported entry by the conciliation commissioner of three orders directing sale of livestock, feed and farm implements as "perishable." R. 10, entry of September 7, 1940. R. 77 to 88.

September 16, 1940—Petition by farmer debtor to conciliation commissioner for rehearing of order of August 13, 1940, filed. R. 10, entry of September 16, 1940. R. 139 to 147.

September 17, 1940—Petition by the farmer debtor to District Court for an emergency restraining order setting up the void order of August 13, 1940, for stay, rental and additional payments, and apprising the court of the pending petition for rehearing of it, also averring that although no formal order of sale had been issued by the conciliation commissioner, yet the farmer debtor had been informed that said conciliation commissioner proposed to issue an order to sell his cows, etc., within ten days from September 7. R. 27 to 35. Answer and exhibit. R. 35 to 40, order of denial by District Court. R. 41.

September 20, 1940—Petition by farmer debtor to conciliation commissioner for rehearing of three orders of September 7, 1940. R. 11, entry of September 20, 1940. R. 88 to 96.

September 30, 1940—Denial by conciliation commissioner of petition for rehearing of three orders of September 7, 1940. R. 12, entry of September 30, 1940. R. 109 to 116.

October 9, 1940—Petition for review of three orders of September 7, 1940. R. 12, entry of October 9, 1940. R. 116 to 129.

November 28, 1940—Denial of petition for rehearing of Order of August 13, 1940. R. 13, entries of November 28, 1940. R. 158 to 164.

November 28, 1940—Petition for review of Order of August 13, 1940. R. 13, first entry of November 28, 1940. R. 165 to 172.

December 13, 1940—Expiration of "four months from the date that the referee approves the appraisal." Quoted from the last sentence of the first paragraph of Section 75(s).

December 16, 1940—District Court dismissed petitions for review for lack of jurisdiction. R. 173 to 175. R. 176 to 178.

November 10, 1941—Circuit Court of Appeals affirmed the District Court. Opinion R. 209 to 215. Final orders, R. 215 to 216.

December 6, 1941—Circuit Court of Appeals denied a petition for rehearing. R. 220.

II.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code, 28 U.S.C. 347(a).

The petitioner has complied with Section 8(a) of the Act of February 13, 1925; 28 U.S.C. 350. The judgments of the Appellate Court below (R. 209 to 215) became final on December 6, 1941 when his petition for rehearing was denied. R. 220. This petition for certiorari is filed within three months thereafter.

III.

THE QUESTIONS PRESENTED.

The questions presented are:

1.

Did the District Court have jurisdiction to hear the petitions for review which were filed within the four months period fixed by Section 75(s)?

2.

Did the District Court have jurisdiction to hear the petitions for review which were filed within ten days after the denial of petitions for rehearing of the orders com-

plained of, no right having intervened, when said petitions for rehearing had been entertained and considered and the entire proceeding had been considered by the conciliation commissioner?

3.

Did the District Court have jurisdiction to hear the petitions for review of void orders of the conciliation commissioner if such petitions for review were not filed within ten days of the entry of such void orders?

4.

Did the District Court have jurisdiction, while the farmer debtor proceeding was still pending, to hear petitions for review of orders entered by a conciliation commissioner regardless of when such petitions for review were filed?

5.

Is Section 39(c) of the Bankruptcy Act, in providing a period of ten days for filing a petition for review a statute of limitation or is it the adoption by statute of a rule of procedure?

6.

Is Section 2(10) of the Bankruptcy Act limited by Section 39(c) of that Act?

7.

Is Section 38 of the Bankruptcy Act limited by Section 39(c) of that Act?

8.

When an order is issued by a conciliation commissioner in a farmer debtor proceeding and, while the proceeding is still pending and no right has intervened, a petition for

rehearing is filed and entertained by the conciliation commissioner who overrules a motion to dismiss the petition for rehearing for lack of jurisdiction to entertain it, and the entire proceeding is considered by the conciliation commissioner, and the conciliation commissioner then denies said petition for rehearing, does the time for seeking a review of said order run from the date of the overruling of the petition for rehearing?

9.

When no right has intervened, does the period named in Section 39(c) of the Bankruptcy Act limit the time within which an application may be made to a conciliation commissioner for rehearing and reconsideration of an order entered by him in a proceeding under Section 75 of that Act?

10.

If no right has intervened, may a conciliation commissioner in a farmer debtor proceeding entertain or consider an application for rehearing of his order if the application be made more than ten days after the entry of the order?

11.

In a farmer debtor proceeding, may a conciliation commissioner fix the statutory stay and rental period so that it starts to run from a date prior to the approval of the appraisal and prior to the order setting aside exemptions?

12.

In a farmer debtor proceeding may a conciliation commissioner in the statutory order staying proceedings and permitting possession to be retained by the farmer debtor upon the payment of rental, make the time of said stay and possession less than three years?

13

13.

In a farmer debtor proceeding, may a conciliation commissioner order sold as perishable property the farmer debtor's cows, bull, horses, sows, farm machinery and farm crops consisting of corn, soy beans, hay, fodder, ensilage, oats, barley, rye and wheat?

14.

In a farmer debtor proceeding may a conciliation commissioner order the farmer debtor to pay as rental and as payments on the principal of his debts within 2 years, 8 months and 13 days, the total sum of \$12,750 where the appraisement of all the real estate is \$16,000 and the appraisement of all the unexempt chattels is \$1786?

15.

When proceedings for obtaining a review of an order issued by a conciliation commissioner in a proceeding pending before him under Section 75 of the Bankruptcy Act have been perfected by the filing of a petition for review by a person aggrieved by said order and the serving of a copy of said petition upon the proper adverse parties, and the conciliation commissioner has duly prepared and transmitted to the clerk his certificate on said petition for review, all as prescribed in Section 39(c) of the Bankruptcy Act, may the court dismiss said petition for lack of jurisdiction for the sole reason that said petition for review was not filed within ten days after the original entry of the order complained of?

IV.

**REASONS RELIED UPON FOR ALLOWANCE OF
A WRIT OF CERTIORARI.**

The petitioner respectfully represents that the following special and important reasons necessitate the granting of a review on writ of certiorari to the court below:

1.

The interpretation of a statute of the United States is involved, namely Section 75 of the Bankruptcy Act; Title 11 U.S.C., Section 203. The court below has held that the following specific mandatory provision of Section 75 of the Bankruptcy Act is ineffective, namely: "That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal." (Quoted from the last sentence of the first paragraph of Section 75(s).

2.

The interpretation of another statute of the United States is involved, namely Section 39(c) of the Bankruptcy Act; Title 11 U.S.C., Section 67(e).

The court below has interpreted Section 39(c) to be the supreme grant of jurisdiction to courts of bankruptcy to review the records, findings and orders of a conciliation commissioner in a proceeding under Section 75 of the Bankruptcy Act.

3.

The interpretation of still another statute of the United States is involved, namely Section 2(10) of the Bankruptcy Act; Title 11 U.S.C., Section 11(10).

The court below has held that Section 39(c) of the Bankruptcy Act, which names a period within which to file a petition for review, is a limitation upon the provision of Section 2(10) of the same Act which without qualification expressly invests courts of bankruptcy with full power to exercise original jurisdiction in proceedings under the Act to consider the records, findings and orders certified to the judges by referees and to confirm, modify, or reverse the same or return the records with instructions.

4.

The interpretation of still another statute of the United States is involved, namely Section 38 of the Bankruptcy Act; Title 11, U.S.C., Section 66.

The court below has held that Section 39(c) of the Bankruptcy Act, which names a period within which to file a petition for review, is a limitation upon the provision of Section 38 of the same Act which, without qualification, expressly makes the jurisdiction of a referee and all actions of a referee and all proceedings before a referee subject always to a review by the judge of the bankruptcy court.

5.

There is involved the interpretation of Section 75(s)(2) which reads as follows:

“(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of

the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors; and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation."

the questions being (1) whether the conciliation commissioner may order sold as perishable property a farmer debtor's cows, bull, horses, sows, farm machinery and farm crops consisting of corn, soy beans, hay, fodder, ensilage, oats, barley, rye and wheat, leaving him, for the operation of his 80 acre dairy farm and to achieve rehabilitation, his household goods, 4 heifers, 15 chickens, 130 hens, and a \$275 automobile, mortgaged for its full value; and (2) whether the conciliation commissioner may order that farmer debtor to pay, in addition to rental, such rental

being by statute limited to the rental value, net income and earning capacity of the farm, an extra sum of \$6375 to be paid on the principal of his debts in quarterly installments within 2 years, 8 months and 13 days.

6.

The decision of the court below is in direct conflict with the decision of this court in *Benitez v. Bank*, 313 U. S. 270, 271, decided last term. That decision, at page 271, held that the words, "this section" in Section 75 of the Bankruptcy Act, refers to Section 75 of the Bankruptcy Act, Title 11, U.S.C., 203. The appellate court below held to the contrary that the words "this section" in Section 75 do not refer to Section 75 but to a particular subsection of Section 75 and to only a portion of that subsection. The exact words of the Appellate Court were: "Our duty is to conserve both sections, [that is, Section 75 and Section 39(c) of the Bankruptcy Act], if reasonably possible, that both may be effective. This can be done by construing the word 'section' in the first paragraph of Section 75(s) to refer to only that part of the paragraph which precedes the provisos and we thus construe it." R. 211, bottom of the page, running over to the top of R. 212.

7.

The decision of the appellate court below is in further conflict with the decision of this court in *Benitez v. Bank*, 313 U.S. 270. There this court held that in a farmer debtor proceeding, the provisions of said Section 75 are superior to the other provisions of the Bankruptcy Act, having been expressly left unaffected by the Bankruptcy Revision Act of 1938. That decision of this court also held that when a provision of Section 75 conflicts with a provision of the general Bankruptcy Act, the provision of Section 75 is controlling.

The appellate court below held to the contrary that where a provision of Section 75 conflicts with a provision on the same subject in the General Bankruptcy Act, the General Bankruptcy Act provision overrides the provision of Section 75. The appellate court said: "Hence we think Section 39(c) is controlling here." R. 212, top of page.

8.

The decision of the court below in sustaining the District Court's orders of dismissal is in conflict with the decision of this court in *Potter v. Union Central*, 308 U. S. 524. In that case the Circuit Court of Appeals in *Potter v. Union Central*, (CCA 6), 102 Fed. (2d) 1010, had dismissed the appeal for lack of jurisdiction because objections to a master's report to the District Court had not been filed within the period prescribed by the rules of the district court. This court in its *per curiam* decision said: "As the appeal from the order of the District Court, filed December 4, 1937, was duly perfected, the Circuit Court of Appeals had jurisdiction and its order dismissing the appeal was error."

9.

The decision of the court below in holding that literal compliance with Section 39(c) of the Bankruptcy Act is jurisdictional, is in direct conflict with the decisions of all other Circuit Courts of Appeals on the same subject matter of the interpretation of that Section.

In the Third Circuit:

Thummess v. Von Hoffman, (CCA 3), 109 Fed. (2d) 291, decided January 15, 1940, held that "No question as to the jurisdiction of the Bankruptcy Court to entertain a petition for review is involved by Section 39, sub. (c)".

In the Second Circuit:

In re Albert; Brooklyn v. Albert, (CCA 2), 122 Fed. (2d) 393, decided July 22, 1941, held that "Its [that is, a court of bankruptcy's] power to review orders of referees flows from Section 2 (10) of the Act and nothing in Section 39(c) expressly limits that power".

In the Sixth Circuit:

Miller v. Hatfield, (CCA 6) 111 Fed. (2d) 28, decided April 11, 1940. Where no petitions for review were filed until long after 10 days the District Court dismissed them for lack of jurisdiction. The Circuit Court of Appeals upon consideration of Section 39(c) reversed the District Court, holding it had jurisdiction.

District Courts also have generally reached the same conclusion:

In re Madonia, (District Court, Illinois), 32 Fed. Supp. 165.

In re Amsterdam (District Court, New York), 35 Fed. Supp. 618.

In re Ragozinno, (District Court, New York), 37 Fed. Supp. 524.

In re Fergus Falls, (District Court, Minnesota), 41 Fed. Supp. 355.

10.

The final orders of the District Court below in this case (which were affirmed by the appellate court) are in direct conflict with a former decision by the same judge of the same court upon the same subject matter. In this case the Circuit Court of Appeals below sustained the District Court in dismissing the petitions for review for want of jurisdiction. The assumption was that jurisdiction of a petition for review is exclusively defined in Section 39(c)

of the Bankruptcy Act. The same District Court, by the same judge, held to the contrary and in accord with the main current of decisions in the case of *In re Madonia*, District Court of Illinois, 35 Fed. Supp. 165, decided March 27, 1940, which was nine months before the inconsistent final orders were entered in this matter. After quoting Section 39(c) the same judge there said: "It is the position of the trustee that the provisions for filing the petition for review and serving a copy upon the adversary are jurisdictional and that if the petition is not filed and the copy served within the ten day period (unless the court has within the ten days granted an extension), the referee is without power to grant the petition, or the judge to hear it. I can not agree. Statutes granting a right of review of the order of a court shall be liberally construed, so that if error occurs, it may be corrected."

11.

The decision of the court below in holding that the petitions for rehearing of said orders did not expunge the finality of the original entries thereof, merely because said petitions for rehearing were not filed with the conciliation commissioner within the period named in Section 39(c) of the Bankruptcy Act for filing petitions for review, is in conflict with the decisions of this court in the following cases, among others:

Brockett v. Brockett, (1843) 43 U. S. (2 How.) 238;
Washington v. Bradley, (1869), 74 U. S. (7 Wall.)
 575;

Memphis v. Brown, (1877) 94 U. S. (4 Otto) 715;
Texas v. Murphy (1884), 111 U. S. 488;

Andrews v. Virginian (1919), 248 U. S. 272;

Citizens v. Opperman (1919), 249 U. S. 488;

Gypsy v. Escoe (1927), 275 U. S. 498;

U. S. v. Seminole (1937), 299 U. S. 417.

Wayne v. Owens-Illinois (1937), 300 U. S. 131, 136, 137;

Bowman v. Loperena (1940), 311 U. S. 262.

The rule of such decisions of this court have thoroughly established federal procedure and have been followed by the lower federal courts for nearly a century.

12.

The decision of the appellate court below in holding that a conciliation commissioner may not rehear his order after the expiration of ten days from its entry is in direct conflict with the decision of other Circuit Courts of Appeals in:

In the Matter of Pottasch, Central v. Irving, CCA 2, 79 Fed. (2d) 613, decided November 12, 1935, before the decision of this court in *Wayne v. Owens-Illinois*, (1937), 300 U. S. 131.

Miller v. Hatfield, CCA 6, 111 Fed. (2d) 45, decided April 11, 1940; after the decision of this court in *Wayne v. Owens-Illinois*, (1937), 300 U. S. 131, and expressly referring to the present Section 39(c) of the Bankruptcy Act.

In re Jayrose, (CCA 2) 93 Fed. (2d) 471, decided December 13, 1937, ten months after *Wayne v. Owens-Illinois* (1937), 300 U. S. 131.

13.

The decision of the appellate court below in holding that "However, in this case, the rehearing was not had or granted" (R. 213, middle of paragraph continued from R. 212), referring to the denial by the conciliation commis-

sioner of the petitions for rehearing after denying motions to dismiss them for want of jurisdiction to entertain them and then hearing them, and considering the whole proceeding, and meaning that the orders, to which said petitions for rehearing were directed were not thereby vacated or expunged, is in conflict with the decisions of this court in:

Brockett v. Brockett (1843), 43 U. S. (2 How.) 238;

Washington v. Bradley (1869), 74 U. S. (7 Wall.) 575;

Memphis v. Brown (1877) 94 U. S. (4 Otto) 715;

Texas v. Murphy (1884) 111 U. S. 487;

Aspen v. Billings (1893) 150 U. S. 31;

Kingman v. Western (1898) 170 U. S. 675;

U. S. v. Ellicott (1912), 233 U. S. 524;

Andrews v. Virginian (1919) 248 U. S. 272;

Chicago v. Basham (1919) 249 U. S. 164;

Citizens v. Opperman (1919) 249 U. S. 488;

Morse v. U. S. (1926), 270 U. S. 151;

Gypsy v. Escoe (1927), 275 U. S. 498;

U. S. v. Seminole (1937), 299 U. S. 417;

Bowman v. Loperena (1940), 311 U. S. 262.

Which decisions have been generally followed and federal procedure has conformed to them for nearly a hundred years.

14.

The decision of the appellate court below in holding that the filing of a petition for rehearing with the conciliation commissioner, its consideration by the conciliation commissioner, the refusal of the conciliation commissioner to dismiss such petition for rehearing, and the consideration of the whole proceeding by the conciliation commissioner, did not have the effect, for the purpose of seeking a re-

view, of vacating or expunging the order to which the petition for rehearing was directed, merely because the conciliation commissioner did not formally vacate such order and enter a new order after rehearing, is in conflict with the decisions of this court, among others, in:

Brockett v. Brockett (1843), 43 U. S. (2 How.) 238;

Washington v. Bradley (1869), 74 U. S. (7 Wall.) 575;

Texas v. Murphy (1884), 111 U. S. 487;

Aspen v. Billings (1893), 150 U. S. 31;

Kingman v. Western (1898), 170 U. S. 675;

U. S. v. Ellicott, (1912), 233 U. S. 524;

Chicago v. Basham (1919), 249 U. S. 164;

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Morse v. U. S. (1926), 270 U. S. 151;

Gypsy v. Escoe (1927), 275 U. S. 498;

U. S. v. Seminole (1937), 299 U. S. 417;

Bowman v. Loperena (1940), 311 U. S. 262.

Federal procedure in the lower courts is thoroughly established in conformity with these decisions.

15.

The decision of the appellate court below in holding that an order issued by a conciliation commissioner on the same day that a creditors' motion seeking it was filed, without any notice that said motion would be filed or heard, is a valid and binding order, and within the power of the conciliation commissioner to issue it, is in conflict with the decisions of this court in the following cases:

Voorhees v. Jackson (1836), 35 U. S. (10 Pet.) 449, 474;

Galpin v. Page (1874), 85 U. S. (18 Wall.), 350, 368;

Windsor v. McVeigh (1876), 93 U. S. 274;

Holden v. Hardy (1898), 169 U. S. 366, 389;

Ballard v. Hunter (1907), 204 U. S. 241;

Twining v. New Jersey (1908), 211 U. S. 78, 102;

Coe v. Armour (1917), 237 U. S. 413, 426;

Morgan v. United States (1938), 304 U. S. 1, 18.

Said decision is likewise in conflict with other Circuit Court of Appeals decisions, namely:

Sheets v. Livy (1938), CCA 4, 97 Fed. (2d) 674;

In re Rosser (1900), CCA 8, 101 Fed. 106;

Boyd v. Glucklich (1902), CCA 8, 116 Fed. 131;

In re Frank (1910), CCA 8, 182 Fed. 794.

The last three cited cases hold that a referee may not issue an order granting a motion presented at a creditors' meeting without any notice thereof except the general notice that a creditors' meeting is to be held.

Said decision of the appellate court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the lower district court as to call for an exercise of its power of supervision by this court. Said decision has sanctioned the violation of due process of law in proceedings pending in the bankruptcy court before the conciliation commissioner in that at the first creditors' meeting under Section 75(s) certain creditors, respondents here, presented a motion for the issuance of an order requiring the farmer debtor to pay a sum of \$6375 in addition to rent and said conciliation commissioner on the same day issued such an order, without any

notice whatever having been given to the farmer debtor or his counsel that such a motion would be presented or heard or that such an order would be considered or issued.

Said order was issued in violation of the Fifth Amendment to the Constitution of the United States which prohibits the deprivation of property without due process of law.

Wherefore your petitioner prays that a writ of certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit directing it to certify and send to this court a transcript of the record and proceedings thereon so that this cause may be received and determined by this court. He further prays for all other relief that may be proper.

Respectfully submitted,

ELMER MCCLAIN,

Lima, Ohio.

Lima, Ohio

February 6, 1942.

Note: Section 2(10), Section 38, Section 39a (8) and c and Section 75 of the Bankruptcy Act are inserted following this page.

Sections of the Bankruptcy Act Which Are Involved.

Section 2. "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to . . ."

(10). "Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings; . . ."

Section 38. "Referees are hereby invested, subject always to a view by the judge, with jurisdiction to" . . . [conduct specified proceedings in bankruptcy matters].

Section 39. "a. Referees shall" . . . "(8) prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits; . . ."

"c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing." . . .

Section 75 follows.

AGRICULTURAL COMPOSITIONS AND EXTENSIONS

SECTION 75 OF THE BANKRUPTCY ACT AS
AMENDED BY—

PUBLIC 296 OF THE SEVENTY-THIRD CONGRESS
PUBLIC 60 OF THE SEVENTY-FOURTH CONGRESS
PUBLIC 384 OF THE SEVENTY-FOURTH CONGRESS
PUBLIC 439 OF THE SEVENTY-FIFTH CONGRESS
PUBLIC 696 OF THE SEVENTY-FIFTH CONGRESS
PUBLIC 423 OF THE SEVENTY-SIXTH CONGRESS

TITLE 11, SECTION 203, UNITED STATES CODE

(Reprint of Senate Document No. 55, 75th Congress)



PRESENTED BY MR. NYE
FOR MR. FRAZIER

JUNE 10 (legislative day, MAY 28), 1940.—Ordered to be printed
with certain corrections

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1940

AGRICULTURAL COMPOSITIONS AND EXTENSIONS

[PUBLIC—No. 420—72D CONGRESS]

[H. R. 14359]

AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," as amended by the Acts of February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, and February 11, 1932, be, and it is hereby, amended by adding thereto a new chapter to read as follows:

"CHAPTER VIII

[As amended by the 73rd, 74th, 75th, and 76th Congresses]

"PROVISIONS FOR THE RELIEF OF DEBTORS

"SEC. 75. AGRICULTURAL COMPOSITIONS AND EXTENSIONS.—(a) Within thirty days after June 7, 1934, every court of bankruptcy of which the jurisdiction or territory includes a county or counties having an agricultural population (according to the last available United States census) of five hundred or more farmers shall appoint one or more referees to be known as 'conciliation commissioners', one such conciliation commissioner to be appointed for each county having an agricultural population of five hundred or more farmers according to said census: *Provided further,* That where any county in any such district contains a smaller number of farmers according to said census, for the purposes of this paragraph such county shall be included with one or more adjacent counties where the population of the counties so combined includes five hundred or more farmers, according to said census. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office for one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee¹ and in addition is a resident

¹Sec. 35 of Chandler Act, Public, 696, of the 75th Cong., requires all new referees to be attorneys.

of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

"(b) Upon filing of any petition by a farmer under this section there shall be paid a fee of \$10 to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, a fee of \$25 for each case submitted to him, ~~and when docketed, to be paid out of the Treasury to be paid out of the Treasury when the conciliation commissioner completes the duties assigned to him by the court.~~ A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of \$5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer; as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment, and assistance furnished him by other Federal officials, or by any State, county, or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived.

"(c) At any time within 5 years after March 3, 1933, prior to March 4, 1944, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

"(d) After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

"(e) The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

"(f) There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer's estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any supplementary inventory filed by a committee of the creditors.

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims.

"(h) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

"(i) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

"(j) The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer's affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided*, That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24,

of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

"(k) Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured.

"(l) Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided,* That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

"(m) The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

"(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirma-

tion of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

"(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

"(r) For the purposes of this section, and section 4 (b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy

farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and

earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession; including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of

this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection(s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

"(5) This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Section, as well as to future cases. All cases under this Section that have been dismissed by any conciliation commissioner, referee, or Federal Court because such Court erroneously assumed or held that subsection(s) of section 75 of this Act was unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section."

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceeded to liquidate the estate."

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

This brief will be confined, as strictly as possible, to the subject of the petition it supports.

Copies (applicable portions) of Section 2(10), 38 and 39a(8) and (c) and the whole of Section 75 of the Bankruptcy Act are inserted for reference preceding this brief and following the petition for certiorari.

The digest of cases referred to in this brief is collected in a "Supplemental Brief" filed herewith.

I.

Subject Index

The subject index precedes the Petition for Certiorari.

II.

THE REPORT OF THE OPINION BELOW.

The opinion of the Appellate Court below is reported as *Pfister v. Northern Illinois Finance Corporation*, CCA 7, 123 Fed. (2d) 523, decided November 10, 1941: R. 209 to 215.

The District Court below issued no opinion. The two final orders of the District Court are found at R. 173 to 178.

III.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The grounds on which the jurisdiction of this court is invoked has been set out at pages 10 to 24 of the preceding petition for certiorari under the headings: "Statement of the Basis of the Jurisdiction of this Court," "The Questions Presented," and "Reasons Relied Upon for the Allowance of a Writ of Certiorari."

IV.

A CONCISE STATEMENT OF THE CASE.

The Farmer Debtor and His Property.

The petitioner is a farmer debtor who owns, and with his family, resides upon and operates an 80 acre dairy farm in Illinois. His other property consists of approximately 20 cows, 1 bull, 3 horses, 20 hogs, and 130 chickens, together with the usual implements and other equipment necessary to operate such a dairy farm. R. 14, R. 20, R 70 to 72.

The Farmer Debtor Law Invoked.

Becoming indebted beyond his ability to pay, he filed his farmer debtor petition for composition or extension of his debts under Section 75 of the Bankruptcy Act. Failing to obtain a settlement with his creditors, he amended his petition pursuant to Section 75(s) of that Act in order to obtain the three year statutory stay while paying rental, pending his eventual rehabilitation by redeeming his mortgaged property at its appraised valuation.

Incapacity of Farmer Debtor's Counsel.

After the amended petition had been filed and before the first creditors' meeting under it, the farmer debtor's counsel, J. E. Dazey, Esq., became incapacitated as a result of a stroke of apoplexy and participated no further in the case except to prepare his affidavit which described his physical condition. R. 34.

Mr. Dazey resided in another federal court district of the State of Illinois and in compliance with a local court rule, he had designated a young local attorney, Robert E. Coulson, Esq., as co-counsel for the purpose of filing papers, and receiving service. The farmer debtor did not engage Mr. Coulson and he was not authorized to represent the farmer debtor in any substantive capacity, nor did he attempt to do so. R. 30, par. 6. Verification of Robert E. Coulson: R. 34, top of page. R. 34, bottom of page and top of R. 35. R. 89, par. 2. R. 94 to 95. R. 146 par. 15. Denied by creditors: R. 36, par. 6. R. 97, par. 2. R. 154, par. 10.

Since his incapacity Mr. Dazey has not participated in the proceeding except to prepare his affidavit which appears at R. 34. Mr. Coulson has not participated in the proceeding since shortly after the orders complained of except to verify the petition of the farmer debtor to the Judge of the District Court for a restraining order which sought to stop a sale then believed to be imminent and to make his affidavit as part of the petition for rehearing of the purported orders of September 7, 1940. R. 27 to 35. His verification noted at R. 34, top of page. R. 94.

First Creditors' Meeting.

Order of August 13, 1940, approving appraisal, staying proceedings, fixing rental and principal payments (R. 9, entry of August 13, 1940. R. 10, entries of August 13, 1940. R. 72 to 77.)

On August 13, 1940, was held the first creditors' meeting under the amended petition pursuant to Section 75(s). At that meeting the conciliation commissioner approved the appraisal and set off the farmer debtor's exemptions. R. 10, entries of August 13, 1940. R. 69 to 72.

On the same day, without any preliminary notice whatever, three of the respondents presented motions praying that rent be set at \$6,375 for three years and that additional payments on the principal of debts be ordered paid in the sum of \$6,375 making a total of \$12,750 to be paid within the three-year period. R. 9, entry of August 13, 1940. These motions were granted on the same day by ordering the total of \$12,750 to be paid by the farmer debtor within 2 years, 8 months, and 18 days. Rental was to be paid semi-annually while the principal payments were to be made quarterly. The estate from which, under the statute, this sum of \$12,750 was to be obtained out of its earnings, as well as whatever would be needed to achieve rehabilitation of the estate at its appraised value, was comprised of the real estate appraised at \$16,000 and un-exempt chattels appraised at \$1,786.00.

The order of August 13, 1940, also stayed proceedings for two years, eight months and 13 days from that date. That is, a so-called three-year statutory stay was made to run, not from the entry of the order as required by the statute, but from April 26, 1940. The last payment was ordered to

be made by April 26, 1943. R. 9, entry of August 13, 1940. R. 72 to 77. Sec. 75(s)(2). *Wright v. Union Central*, 311 U.S. 273, 275, citing *John Hancock v. Bartels*, 308 U.S. 180 and *Borchard v. California*, 310 U.S. 311.

Adjourned Creditors' Meeting.

The Purported Orders of September 7, 1940 (R. 10, entry of September 7, 1940; R. 40, Exhibit "B". R. 77. R. 80. R. 82).

The creditors' meeting of August 13, 1940, was adjourned to September 7, 1940, when three additional orders are purported to have been issued. The uncertainty concerning the actual time of entry of these three orders is discussed at page 53 of this brief under heading "Sixth."

Creditors' petitions for reclamation of mortgaged chattels were pending before the conciliation commissioner. R. 8 to 9, entries of August 7, August 8, and August 10, 1940. Those granted appear at R. 42 to 48, R. 48 to 60, and R. 60 to 65. The orders issued in compliance with them ordered sold as "perishable property," the farmer debtor's cows, bull, horses, sows, farm machinery and his 1939 crops. R. 77 to 88. He would have left, after this shearing, with which to comply with the rental, principal payment and stay order of August 13, 1940, and to accomplish his rehabilitation, his farm and these chattels: household goods worth \$105; 4 heifers worth \$50; 15 pigs worth \$20; 130 hens worth \$50; and an automobile worth \$275 and which was mortgaged for its full value. R. 18. R. 71. Total \$510 of which \$235 was free of mortgage.

The Effect of the Orders of August 13 and September 7, 1940.

A general recapitulation of his financial obligation to the court under the orders of August 13 and of September 7, 1940, shows that out of his 80 acre farm and \$510 worth of chattels he would, within 2 years, 8 months and 13 days, have to find, as a result of these two orders:

1.

The Following Payments

| | |
|------------------|-----------|
| August 28, 1940 | \$ 406.25 |
| October 26, 1940 | 1,218.75 |
| January 26, 1941 | 406.25 |
| April 26, 1941 | 1,218.75 |
| July 26, 1941 | 531.25 |
| October 26, 1941 | 1,593.75 |
| January 26, 1942 | 531.25 |
| April 26, 1942 | 1,593.75 |
| July 26, 1942 | 656.25 |
| October 26, 1942 | 1,968.75 |
| January 26, 1943 | 656.25 |
| April 26, 1943 | 1,968.75 |

| | |
|--|-------------|
| Total to meet the combined orders of August 13 and September 2, 1940 within 2 years 8 months 13 days | \$12,750.00 |
|--|-------------|

2.

By April 26, 1943, the farmer debtor would be confronted with the necessity of redeeming his farm and automobile pursuant to Section 75(s)(3) by paying their appraised value less payments on principal. The appraisal of the farm was \$16,000. R. 69 to 70. The automobile was appraised at \$275. R. 71.

There are other liens against the farm (R. 17 to 18), of more than \$6000. The rent payments would be applied first to upkeep and taxes. Section 75(s)(2). Delinquent taxes alone were \$1028.32 on June 12, 1940. R. 6, entry of June 12, 1940. Current taxes are not stated. After upkeep and taxes were paid the balance of rent payments would be paid to creditors "as their interests may appear." The first mortgage bears 7 per cent. R. 16. After paying \$12,750 within 2 years, 8 months and 13 days, he probably would find himself with the same financial situation that confronted him in the beginning.

The result would inevitably be that he could not rehabilitate himself. Yet Section 75(s)(2), makes the power of the conciliation commissioner to order principal payments conditioned upon "the debtor's ability to pay, with a view to his financial rehabilitation." Section 75(s)(2).

Application for Emergency Restraining Order Against the Conciliation Commissioner (R. 27 to 34).

In September the farmer debtor heard that his chattels were to be sold or advertised for sale upon order of the conciliation commissioner, but his new counsel retained for the purpose of stopping the sale and securing redress from the stay, rental and extra payment order, was unable to find any such order. R. 32, paragraphs 8 and 9. Verification by Robert Coulson, local attorney, noted at R. 34, top of page. R. 90, par. 3. The farmer debtor therefore on September 17, 1934, filed his petition for an order restraining the conciliation commissioner from selling his chattels. R. 27 to 34. It was denied by the judge of the District Court by his order entered September 19, 1934 (R. 41), alternative remedies being deemed adequate.

Petitions for Rehearing and Their Denial.

On September 16, 1940, the farmer debtor filed with the conciliation commissioner his petition for rehearing of the stay, rental and principal payment order of August 13, 1940. R. 139 to 147. The affidavits of Attorneys Dazey and Coulson therein referred to are at R. 34 to R. 94. To this petition for rehearing a motion by the creditors to dismiss for want of jurisdiction in the conciliation commissioner to hear it was overruled. R. 148. R. 149 to 150. The creditors then filed answers. R. 151 to 157. The conciliation commissioner, after a hearing, and after considering the whole proceeding denied the petition for rehearing on November 28, 1940. R. 158 to 164. R. 13, entry of November 28, 1940.

On September 20, 1940, he filed with the conciliation commissioner his petition for rehearing of the three "perishable property" sale orders of September 7, 1940. R. 88 to 96. An oral motion to dismiss this petition for rehearing for want of jurisdiction in the conciliation commissioner to hear them was denied although the record does not show it.

Answers were filed by the creditors. R. 97 to 108. The conciliation commissioner after a hearing and after fully considering the petition for rehearing and the whole proceeding denied it. R. 11, entries of September 20, September 23, September 26 and September 30, 1940. R. 109 to 116.

Petitions for Review.

On November 28, 1940, a petition for review of the order of August 13 relating to rental, principal payments and

This statement was also made in the Appellate Court below ("Appellant's Brief" at pages 13 to 14) and in the oral argument. It has never been denied.

stay was filed with the conciliation commissioner. R. 165 to 172. It was duly certified by the conciliation commissioner to the District Court. R. 172 to 173.

On October 9, 1940, a petition for review of the three orders of September 7, 1940, for the sale of the farmer debtor's chattels as "perishable property" was filed with the conciliation commissioner. R. 116 to 129. It was also duly certified by the conciliation commissioner to the District Court. R. 130 to 132.

Dismissal by the District Court of the Petitions for Review.

On December 16, 1940, the District Court dismissed both petitions for review upon the ground, in each instance, that there was no jurisdiction to hear them. R. 173 to 178.

Affirmance by the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the dismissals by the District Court. Opinion, R. 209 to 215. *Pfister v. Northern Illinois*, 123 Fed. (2d) 543. Final orders R. 215 to 216. Petition for rehearing denied. R. 220. Mandate stayed to February 14, 1942, pending application for certiorari. R. 233.

V.

SPECIFICATION OF ERRORS.

1.

The Appellate Court erred in holding that the District Court did not have jurisdiction to hear a petition for review which was filed within the four-months period following approval of the appraisal, as fixed by Section 75(s).

2.

The Appellate Court erred in holding that the District Court had no jurisdiction to hear petition for review which was filed within 10 days after the denial of a petition for rehearing of an order complained of, no right having intervened, and said petition for rehearing having been entertained and considered, and the entire proceeding having been considered by the conciliation commissioner.

3.

The Appellate Court erred in holding that the District Court had no jurisdiction to hear a petition for review of a void order of a conciliation commissioner unless such petition for review was filed within ten days of the entry of such void order.

4.

The Appellate Court erred in holding that the District Court had no jurisdiction, while a farmer debtor proceeding was still pending, to hear a petition for review of an order entered by a conciliation commissioner, regardless of when such petition for review was filed.

5.

The Appellate Court erred in holding that Section 39(c) of the Bankruptcy Act in naming ten days for the filing of a petition for review is a statutory limitation and not a rule of procedure.

6.

The Appellate Court erred in holding that Section 2(10) of the Bankruptcy Act is limited by Section 39(c) of that act.

7.

The Appellate Court erred in holding that Section 38 of the Bankruptcy Act is limited by Section 39(c) of that Act.

8.

The Appellate Court erred in holding, in a farmer debtor proceeding pending before a conciliation commissioner where a petition for rehearing of an order is filed, no right having intervened, and said petition for rehearing is entertained by the conciliation commissioner who overrules a motion to dismiss it for lack of jurisdiction to entertain it, and considers the whole proceeding and then denies the petition, that the time for seeking a review of said order does not run from the date of the denial of such petition for rehearing.

9.

The Appellate Court erred in holding that in a farmer debtor proceeding the period named in Section 39(c) of the Bankruptcy Act limits the time within which a petition for rehearing of an order may be filed with a conciliation commissioner, no right having intervened.

10.

The Appellate Court erred in holding that a conciliation commissioner in a farmer debtor proceeding may not entertain or consider a petition for rehearing of his order except when such petition is filed within ten days of the entry of the order, even though no right has intervened.

11.

The Appellate Court erred in sustaining the District Court in declining to hear and in dismissing, on the ground of lack of jurisdiction, a petition for review of the order

of the conciliation commissioner which fixed the statutory stay and rental period in the farmer debtor proceeding to run from a date prior to the approval of the appraisal and prior to the order setting aside exemptions.

12.

The Appellate Court erred in sustaining the District Court in declining to hear, and in dismissing, on the ground of lack of jurisdiction, a petition for review of the statutory order of the conciliation commissioner which stayed proceedings and permitted possession to be retained by the farmer debtor upon payment of rental, and made the time of such stay and possession less than three years.

13.

The Appellate Court erred in sustaining the District Court in declining to hear, and in dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner which ordered sold as perishable property the farmer debtor's cows, bull, horses, sows, farm machinery and farm crops consisting of corn, soy beans, hay fodder, ensilage, oats, barley, rye and wheat.

14.

The Appellate Court erred in sustaining the District Court in declining to hear, and in dismissing, upon the ground of lack of jurisdiction, a petition for review of an order by a conciliation commissioner ordering the farmer debtor to pay as rental and as payments on the principal of his debts, within 2 years, 8 months and 13 days, the total sum of \$12,750 where the appraisal of all the real estate is \$16,000 and the appraisal of all the unexempt chattels is \$1,786.

The Appellate Court erred in sustaining the District Court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner, when proceedings for obtaining such review had been perfected by the filing of a petition for review by a person aggrieved by such order and the serving of a copy of said petition upon the proper adverse parties, and when the conciliation commissioner had duly prepared and transmitted to the clerk his certificate on said petition for review, all in compliance with Section 39(c) of the Bankruptcy Act, such dismissal being based upon the sole reason that said petition for review was not filed within ten days after the original entry of the order complained of.

VI.

SUMMARY OF THE ARGUMENT

The substantive acts of the conciliation commissioner would deprive the farmer debtor of his farm in violation of the express provisions of Section 75 designed to save it to him and are void. The procedures by which they would be accomplished are subversive of the purpose of the law. Due process of law was violated.

The opinion of the appellate court when compared with the statutes and decisions it rests upon is found to be inconsistent with them.

In holding that the express provisions of Section 75 are limited by other general provisions of the Bankruptcy Act the decision below, if followed, would destroy the farmer debtor law.

In holding that a petition for rehearing, if entertained and considered, does not expunge the finality of an order so that if denied the time for appeal from the order runs from the denial, the decision below runs counter to a principle of law as old as American Jurisprudence.

In holding that a district court has no jurisdiction or power to hear a petition for review, certified to it by a referee, if the petition for review was filed more than ten days after the original entry of an order, the appellate court runs counter to the uniform holdings of other circuits and sustains the district court in a holding inconsistent with that court's former ruling by the same judge in accord with the generally recognized rule.

The holding that orders in direct violation of express statutory provision in Section 75 may not be corrected, while a farmer debtor proceeding is pending, is contrary to the long established holdings of this court and of the lower courts. Reference is here had to orders: (1) starting the stay period at a date preceding the entry of the order which declared it, (2) fixing a rental impossible to earn from the estate, (3) fixing impossible extra principal payments, and (4) ordering sold the farmer debtor's dairy cows, bull, sows, horses, farm machinery and crops, all done ostensibly by authority of the statute itself.

VII.

ARGUMENT.

The General Nature of the Orders

(1) Their Relation to Substantive Rights.

Had the substantive acts of the conciliation commissioner of the Bankruptcy Court below first been narrated in fictional form, they would probably have been considered too fantastic to conform to actuality. They were orders providing for:

1. A foreshortened stay period of 2 years, 8 months and 13 days, violative of Section 75(s)(2), and of the pronouncement of this court in *Wright v. Union Central*, 311 U.S. 273, 275, citing *John Hancock v. Bartels*, 308 U.S. 180, and *Borchart v. California*, 310 U.S. 311.

2. A rental of \$6,375 for the foreshortened stay period on an 80 acre, 20 cow dairy farm, violative of Section 75(s)(2) which requires that "the amount and kind of such rental to be the **usual customary rental** in the community where the property is located, **based upon the rental value, not income, and earning capacity of the property.**"

3. Extra payments of \$6,375 within the foreshortened stay period, levied, ostensibly, under power granted in Section 75(s)(2) which provides that "The court . . . may, in addition to the rental, require payments on the principal due and owing by the debtor . . . in payments to be made quarterly, semi-annually or annually, **not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.**"

4. The sale of all the farmer's cows, bull, horses, sows, farm machinery, and crops, leaving him his household goods, four heifers, 15 pigs, 130 hens and an automobile mortgaged to its full value.

(2) The Procedures Employed.

The various procedures whereby these actions were accomplished before the conciliation commissioner in the Bankruptcy Court below, while not so extravagantly fantastic, were nevertheless violative of the well recognized and long established principles of English and American Jurisprudence which are proudly heralded as part of the amenities of our legal system which distinguish it from others and are held up as examples of the progress of our civilization. They are all the more dangerous, and subversive to the accepted and usual course of judicial procedure, in that they were packaged in forms intended to carry out the intentions of the law of and established procedure. A perusal of the order of August 13, 1940, at R. 72 to 77, and of the three orders of September 7, 1940, at R. 77 to 88 discloses their design.

The Decision of the District Court Examined.

It has already been shown, at page 19 of the preceding petition, under paragraph 10, that the final orders of the District Court below were in conflict with its own decision in *In re Madonia*, (1940), District Court of Illinois, 32 Fed. Sup. 165, where it held that Section 39(c) does not limit the hearing of a petition for review. See Case No. 31, at page 25, the "Supplemental Brief" herein.

The Opinion of the Circuit Court of Appeals Examined.

1.

The opinion reads: R. 210, last paragraph:

"Appellant first contends that Section 75(s) and not Section 39(c) governs appeals and reviews in farmer debtor cases."

R. 211, bottom of page, R. 212, top of page —:

"Our duty is to so construe both sections, if reasonably possible, that both may be effective. This can be done by construing the word "section" in the first paragraph of Section 75(s) to refer only to the part of that paragraph which precedes the proviso, and we thus construe it. The orders here complained of did not arise under this paragraph, but were entered in the course of hearings authorized under Section 75 (s)(4). Hence we think Section 39(c) is controlling here."

The applicable portion of Section 39(c) reads as follows:

"c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause show allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing." . . .

In *Benitez v. Benk*, 313 U. S. 270, No. 5 at page 5 of the "Supplemental Brief" herein, this court made it very clear that Section 75 is supreme over all conflicting provisions of other portions.

The opinion of the Appellate Court below reads: R. 212, middle of page —:

"Appellant further contends that if Section 39(c) is controlling, his petitions for review were filed in time. His argument in this respect is that his petitions for rehearing stopped the running of time for seeking review; that the finality of the orders of August 13, 1940, and September 7, 1940, was in each instance expunged by a petition for rehearing which he says was seasonably filed, entertained, and denied by the conciliation commissioner.

In support of this contention he relies upon *Bowman v. Lopereno*, 311 U. S. 262; *Wayne Gas Co. v. Owens-Illinois Co.*, 300 U. S. 131; *United States v. Seminole*, 299 U. S. 417, and analogous cases. The facts in these cases are to be distinguished from those of the case at bar in that the petitions for rehearing were granted, the old judgment was vacated, and a new judgment entered after a rehearing on the merits (as in *Wayne Co. v. Owens-Illinois Co.*, supra), or on the ground that the petitions for rehearing were filed within the time provided for appeal, and the order complained of had never become final until the disposal of the petition (as in *Bowman v. Lopereno*, supra). In the present case the petitions for rehearing were not filed within the time allowed for appeal, and each was denied."

With the utmost respect to the Circuit Court of Appeals below it is suggested that not only the three decisions expressly mentioned by the Appellate Court but also those referred to as "analogous cases," all of which were cited by the petitioner as appellant below, support the law as contended in his behalf there.

Analysis of the Cases Referred to by the Appellate Court.

The following analysis of the cases cited and referred to by the appellate court is here presented. There were twelve of them. They are listed below.

It is said in the appellate court's opinion that all these cases are distinguished from the *Pfister* case at bar in that in them the following statements applied which do not apply to this case:

- Statement 1. The petitions for rehearing were granted;
- Statement 2. The old judgment was vacated;
- Statement 3. A new judgment was entered;
- Statement 4. Or the petition for rehearing were filed within the time for appeal.

As to statements 1, 2, 3, or 4, they are correct or incorrect as to the cases cited, as follows:

The Three Cases and the "Analogous Cases."

| | Statement 1 | Statement 2 | Statement 3 | Statement 4 |
|---|-------------|-------------|-------------|-------------|
| Brockett v. Brockett, 1843 43 U. S. (2 How.) 283. Case No. 10, p. 9 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| Texas v. Murphy, 1844 111 U. S. 487. Case No. 52, p. 39 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Not stated |
| Aspen v. Brilings, 1893 150 U. S. 31. Case No. 4, page 3 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| Kingman v. Western, 1898 170 U. S. 675. Case No. 30, page 24 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| United States v. Ellicott, 1912 233 U. S. 524. Case No. 6, p. 42 of the "Supplemental Brief" here- in | Incorrect | Incorrect | Incorrect | Correct |
| Citizens v. Opperman, 1919 249 U. S. 488. Case No. 14, p. 12 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Not stated |
| Morse v. United States, 1926 270 U. S. 151. Case No. 35, p. 47 29 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| Gypsy v. Escos, 1927 275 U. S. 498. Case No. 22, p. 19 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| United States v. Seminole, 1937 299 U. S. 412. Case No. 58, p. 44 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| Wayne v. Owens Illinois, 1937 300 U. S. 131. Case No. 62, p. 46 of the Supplemental Brief herein | Correct | Correct | Correct | Incorrect |
| Bowman v. Leperena, 1940 311 U. S. 262. Case No. 8A, p. 7 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| Carpenter v. Condor, 1939 108 F.2d (2d) 318. Case No. 12, p. 11 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |

² But see abstract of the case at No. 52, page 39 of the "Supplemental Brief" herein.

³ But see abstract of the case at No. 14, page 12 of the "Supplemental Brief" herein.

Thus the analysis of all the cases cited demonstrates that the statements in the opinion are correct or incorrect as a whole as follows:

| | Correct | Incorrect | Not Shown | Total |
|--|------------|--------------|-----------|-------|
| 1. Petition for rehearing were granted | once | Eleven times | | 12 |
| 2. Old judgment vacated | once | Eleven times | | 12 |
| 3. New judgment entered | once | Eleven times | | 12 |
| 4. Petition for rehearing in time for appeal | five times | five times | twice* | 12 |

Total 48

Recapitulation:

| | |
|-----------------|----------|
| Correct | 8 times |
| Incorrect | 38 times |
| Not Shown | 2 times |

Total 48 times

* But see Notes 2 and 3. These "not-stated" instances really belong in the "Incorrect" column making the score: Correct 8 times, Incorrect 40 times.

These cases, whether considered separately or as a whole, establish the long observed rule that the finality of an order for the purpose of appeal, is expunged by an application for rehearing which is seasonably filed, entertained, considered, and denied, the order becoming final for the purpose of appeal upon the denial of the application for rehearing.

3.

The opinion of the Appellate Court reads:

R. 213, middle of page:

"Another distinguishing feature is that it is quite apparent from the record here that **appellant's petition for rehearing was filed merely for the purpose of reviving and extending the time for filing a petition for review**, under which state of facts the court in the *Wayne* case said an appeal should be dismissed."

Again the appellant must respectfully differ from the appellate court's interpretation of the record. The record speaks again and again of the earnest and urgent insistence

that the wrongs done be rectified by the conciliation commissioner where they were committed. "Let us look at the record."

First

R. 34: The actions of the conciliation commissioner occurred while the petitioner's counsel, J. E. Dazey, Esq., was incapacitated from apoplexy. Affidavit of J. E. Dazey. R. 34.

Second

R. 94: The local counsel engaged by Mr. Dazey (not by the petitioner) was not authorized to represent the petitioner substantially but merely to file and receive papers, and he never intended to act in any other capacity. He did not stipulate or agree that cows are perishable. Affidavit of R. E. Coulson. R. 94 to 95.

Third

R. 27. As soon as he heard that he was about to be sold out the farmer debtor, by new counsel, presented to the judge of the district court on September 16, 1940 (R. 10, entry of September 16, 1940) his "Petition for Emergency Restraining Order". R. 27 to 35. He recapitulated the proceedings in his case stating that the orders of August 13, 1940, comprising the foreshortened stay period of 2 years, 8 months and 13 days, the excessive rent of \$6.375 and the extra payments of \$6.375 were void, that he desired to present evidence and the law, that he had not had such opportunity, that he had not admitted or stipulated that any of his property was perishable and that he had already filed a petition for rehearing of the order of August 13, 1940 with the conciliation commissioner. R. 27 to 32, paragraphs 1 to 7 and paragraph 10.

He further averred that no order for the sale of his cattle and other chattels had been entered by the conciliation commissioner, R. 32, paragraph 8, and that he had been informed that at the end of ten days from September 7, 1940, (one day after he filed his application for an Emergency Restraining Order), the conciliation commissioner proposed to issue an order of sale.

He further stated that upon the issuance of an order pursuant to the memorandum of September 7, 1940 (R. 32, paragraph 7, entry of September 7, 1940), he desired to file a petition for review thereof, or a rehearing as necessity should require.

This petition was verified by the petitioner, Henry Anton Pfister, by Robert E. Coulson, the local attorney, and by his new counsel, Elmer McClain. There was also presented to the district judge the affidavit of J. E. Dazey, Esq., in its support. R. 27 to 35.

Three of the respondents answered admitting part and denying part. R. 35 to 40.

Fourth

R. 41: This "Petition for Emergency Restraining Order," R. 27 to 34, was denied by the district court on September 19, 1940. R. 41.

Fifth

R. 139 to 147. As stated to the judge of the district court on September 16, 1940 (R. 31, paragraph 6) the petitioner had on September 16, 1940, filed with the conciliation commissioner his petition for rehearing of the order of August 13, 1940 which appears at R. 139 to 145. On September 23 he filed an amendment thereto. R. 145 to 147.

He related the foreshortened stay period of three years from April 26, 1940, entered August 13, 1940 (R. 140, paragraph 2), the rental payments of \$6,375 to be paid within the foreshortened period (R. 140, paragraph 3), the principal payments of \$6,375, making a total of \$12,750 to be paid within such foreshortened period (R. 140, paragraph 4), stating verbatim the entries appearing on the conciliation commissioner's docket (R. 140 to 142, paragraph 5). He stated the orders of appraisal and exemptions and the impossibility of meeting the payments ordered to be made therefrom (R. 142, to 144, paragraph 6). He stated that said order while bearing the approval of three secured creditors, bore no other approval and that, it was not presented to him or to his counsel and was not approved by him or by his counsel, that he had entered no objection and no hearing had been had on any objection. (R. 144 paragraphs 8 to 10).

He further stated that he had desired at all times during the pendency of his proceeding to present evidence on the subject of the order but had no opportunity to do so and that the evidence to be presented would demonstrate that the rental was contrary to law, and that said stay and possession period was unlawful. R. 144 to 145, paragraphs 11 to 14.

On September 23, 1940, his amendment further, stated J. E. Dazey, Esq., had been engaged by him as his counsel and that Attorney Dazey engaged Robert E. Coulson, Esq., to file and receive papers and to do nothing else and that up to September 7, 1940, Attorney Dazey had not known of any stipulation or agreements; and that Attorney Dazey had been incapacitated from a stroke of apoplexy; that as soon as Attorney Dazey had learned, about September 7, 1940, of the entry of the order of August 13, 1940, he had

engaged new counsel to investigate the dockets and files and protect the rights of the farmer debtor. R. 146-147 paragraphs 15.

The petition for rehearing and its amendment were verified by the petitioner. The affidavit of Attorney Dazey at R. 34 was incorporated. The affidavit of Attorney Coulson at R. 94 was also incorporated.

Three of the respondents moved the conciliation commissioner to strike the petition for rehearing for lack of jurisdiction to consider it. R. 148. The conciliation commissioner overruled it. R. 149. Certain creditors filed answers to the petition for rehearing admitting part and denying part. R. 151 to 157.

Sixth

R. 88 to 96. On September 20, 1940, the petitioner filed with the conciliation commissioner his petition for review of the order of September 20, 1940. He repeated the incapacity of his counsel, J. E. Dazey, Esq., from apoplexy and the limited authority of Robert E. Coulson, Esq., engaged by Attorney Dazey as local counsel to receive and file papers, and not by petitioner; that Attorney Dazey had engaged new counsel to investigate the proceedings as soon as he learned of them (R. 89, paragraph 2), **that on September 12, 1940, said new counsel went to the office of said conciliation commissioner, asked for the conciliation commissioner's docket and file in said cause and copied every entry pertaining thereto and examined and made notes of or copied every paper in said file, taking each paper separately therefrom, and carefully reading it, and there was on said docket no memorandum relating to the sale of petitioner's property except entries copied therefrom in paragraph 6 of this petition for rehearing and that**

there was then in said file no entry of September 7, 1940, ordering the sale of petitioner's chattels, namely cows, (R. 89, paragraph 3); that on September 19, 1940, later petitioner learned three orders had been entered for the sale of his chattels (R. 90, paragraph 4), setting out the appraisal, exemptions, and a list of chattels to be left to him by the sale of certain of his chattels and that the real estate and chattels left were not sufficient to enable him to operate his farm (R. 92, paragraph 6).

He averred that neither he nor his counsel had admitted, consented or stipulated, as stated in the said docket, that any of his chattels were perishable. He said he had desired and still desired to present the evidence and the law relating to the subject of said orders of September 7, 1940, and that he had not had opportunity to do so.

The affidavits of J. E. Dazey, Esq., and of Robert E. Coulson, Esq., were a part of this petition for rehearing R. 94, bottom of page following the prayer.

By an amendment filed August 23, 1940, (R. 95, middle paragraph) the petitioner further stated that in reference to paragraph 4 concerning the "three orders" of September 7, 1940, he did not see them "until one of them was shown by" said conciliation commissioner to the district judge on September 19, 1940, and that until then he did not see or know its contents.

Seventh

But in most of the cases where it has been held that a petition for rehearing filed "merely" to gain time for appeal will not accomplish its purpose, the facts have been that the lower court, for the accommodation of an appellant

who had let the time for appeal go by, granted a rehearing for the purpose of reviving the time for appeal and without giving any consideration to the merits involved. The history of the petitions for rehearing in this instance is quite different.

Explicit petitions for rehearing and amendments were filed showing the strong reasons why rectification should be made in the orders. R. 88 to 97. R. 139 to 148.

Motions to dismiss the petitions for rehearing on the ground that the conciliation commissioner had no jurisdiction to hear them were filed and overruled. R. 148 to 150 on the petition to rehear the order of August 13, 1940. A similar oral motion was made and orally overruled as to the petition to rehear the orders of September 7, 1940, but the record does not show it. See Note 1 at page 36 of this brief.

Answers were filed to both petitions for rehearing. Answer: R. 97 to 107. Reply: R. 107 to 108. Answer: R. 151 to 157. Re Amendment to Answer: R. 160, last part of paragraph ending "after leave of court given". R. 11, entry of September 26, 1940.

Hearings were ~~had~~. R. 11, entry of September 26, 1940. R. 13, entry November 28, 1940. The "entire proceeding" was "considered." See: R. 13, entry of November 28, 1940. "Referee's opinion and decision on Petition for Rehearing and amendment thereto of the Order of August 13, 1940", R. 158 to 164, and the "Referee's opinion and decision on Petition for Rehearing of Orders of September 7, 1940". R. 109 to 116. These all show that the petitions for rehearing were entertained and thoroughly considered by the court.

It would seem to be demonstrated by the record that the petitions for rehearing were presented for relief and not merely to gain opportunity for appeal. What the farmer debtor wanted was the benefit of Section 75 and not litigation. It is impossible to read the pleadings, affidavits, and decisions and not conclude that the petitioner sought relief, not appeal.

4.

The appellate court further says:

R. 313:

"Furthermore, the three orders of September 7 appear from the record to be consent orders, and of course no right of appeal exists in appellant with respect to them."

The assertions of the conciliation commissioner and of the creditors that the farmer debtor "consented", or "stipulated" or "agreed" that his cows, bull, horses, sows, farm machinery and crops were "perishable," and that \$6,375 rental and \$6,375 extra principal payments making a total of \$12,750 to be paid within 2 years, 8 months and 13 days, was "usual customary rental, net income and earning capacity of the property" or within "the debtor's ability to pay with a view to his financial rehabilitation", Section 75 (s) (2), are vigorously denied by the farmer debtor, by Attorney Dazey, and by Attorney Coulson. R. 32 paragraph 10. R. 34, top of page. R. 34-35. R. 93, paragraph 7. R. 94, paragraphs 8 and 9. R. 94 to 95. R. 142 to 144, paragraph 6. R. 144, paragraphs 8 to 11. R. 146, paragraph 15. R. 147, paragraph 16.

The circumstances, as well as the record, seem to cry out that the orders of August 13 and of September 7, 1940, do not qualify to enter the legal category of "consent orders".

Adverting, finally, to the observation of the appellate court at 214 in the last paragraph of the opinion that: "The District Court followed the statute and it had no power to do otherwise" we think the District Court by its own statements in *In Re Madonia* (No. 31 at page 25 of the "Supplemental Brief" herein) clearly shows it had adequate power. Sections 2(10); Section 38.

The following decisions show likewise:

Thummess v. Von Hoffman (CCA 3), No. 53, at upage 40 of "Supplemental Brief" herein;

In re Albert (CCA 2), No. 1, page 2 of "Supplemental Brief" herein;

Miller v. Hatfield, (CCA 2), No. 33, at page 26 of "Supplemental Brief" herein;

In re Amsterdam (District Court), No. 2, at page 2 of "Supplemental Brief" herein;

In re Ragozinno (District Court), No. 42, at page 34 of "Supplemental Brief" herein;

In re Fergus Falls (District Court), No. 17, at page 16 of "Supplemental Brief" herein.

Authority in Support of the Specification of Errors.

The fifteen specifications of errors which are presented at pages 37 to 41 of this brief are based upon and follow "The Questions Presented" and the "Reasons Relied Upon for Allowance of a Writ of Certiorari" at pages 10 to 24 of the Petition for Certiorari.

As briefly as possible the authority in support of each of the specification of errors will be presented.

Specification of Error 1.

The appellate court erred in holding that the District Court did not have jurisdiction to hear a petition for review which was filed within the four months period following approval of appraisal fixed by Section 75(a).

The express provision of Section 75(s) is "That in proceedings under this section either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

The words "this section" can mean only "Section 75," not any part, but all of it.

In *Benitez v. Bank*, No. 5 at page 5 of "Supplemental Brief" herein, this court established that the meaning of the words "this section" is "hardly open to question."

There was reason for this provision. It was imagined that farmer debtor proceedings would not be subject to vigorous and sustained attack. Therefore it was provided that the farmer debtor should need no attorney and that the conciliation commissioner should assist in all procedure. Section 75(q). It was supposed that the procedure would pass quickly out of Section 75(a) to (r) and into Section 75(s) and that any appeals could be collected and taken all at once while the three year stay was running.

Specification of Error 2.

The appellate court erred in holding that the district court had no jurisdiction to hear a petition for review which was filed within 10 days after the denial of a petition for

rehearing of an order complained of, no right having intervened, and said petition for rehearing having been entertained and considered, and the entire proceeding having been considered by the conciliation commissioner.

A long and impressive array of decisions of this court from the beginning of American jurisprudence to the present has established this principle of law:

A petition for rehearing of an order, seasonably made when no right has intervened, if entertained and considered by the court, expunges the finality of that order for the purpose of appeal so that the time for appeal begins to run from the denial of the petition for rehearing.

The cases in which this rule is imbedded are here listed:

In the following cases the petition for rehearing was filed after time for appeal had expired.

Brockett v. Brockett (1844), 43 U.S., (2 How.) 238, No. 10 at page 9 of "Supplemental Brief" herein.

Washington v. Bradley (1869), 74 U.S. (7 Wall.) 575, No. 61 at page 46 of "Supplemental Brief" herein.

Slaughter House Cases (1870), 77 U.S. (10 Wall.) 273, No. 49 at page 37 of "Supplemental Brief" herein.

Memphis v. Brown, (1877), 94 U.S. (4 Otto) 715, No. 32 at page 26 of "Supplemental Brief" herein.

Morse v. United States, (1926), 270 U.S. 151, No. 35 at page 29 of "Supplemental Brief" herein.

Note: In this case the issue was whether a mo-

tion for leave to file a motion for rehearing had the usual effect upon the time for appeal. The motion for leave was filed long after the time for appeal had expired, yet the opinion makes no mention of that fact. Several decisions where a petition for rehearing was filed after time were cited. See No. 35 at page 29 of "Supplemental Brief" herein.

Gypsy v. Escor (1927), 275 U.S. 498, No. 22 at page 19 of "Supplemental Brief" herein.

United States v. Seminole, (1937), 299 U.S. 417, No. 58 at page 44 of "Supplemental Brief" herein.

Wayne v. Owens-Illinois, (1937), 300 U.S. 131, No. 62 at page 46 of "Supplemental Brief" herein.

Rowman v. Loprena (1940) 311 U.S. 262, No. 8A at page 7 of "Supplemental Brief" herein.

In the following case there is nothing to show whether the petition for rehearing was filed within time for appeal but the decisions cited in the opinion show that the court considered a petition for rehearing filed after time had the usual effect on the time for appeal.

Texas v. Murphy, (1884), 111 U.S. 448, No. 52 at page 39 of "Supplemental Brief" herein.

In the following cases there is nothing to show when the petition for rehearing was filed with reference to the time for appeal, and there is nothing to show that the point was considered to be of any importance.

Goddard v. Ordway, (*Phillips v. Ordway*) (1880), 110 U.S. (11 Otto 745, No. 21 at page 18 of "Supplemental Brief" herein.

- Northern v. Holmes*, (1894), 155 U.S. 137, No. 38
at page 31 of "Supplemental Brief" herein.
- Chicago v. Basham*, (1919), 249 U.S. 163, No. 13
at page 11 of "Supplemental Brief" herein.
- Citizens v. Opperman* (1919), 249 U.S. 448, No.
14 at page 12 of "Supplemental Brief" herein.

In the following cases the petition for rehearing was filed within time for appeal but the citations of other decisions in which the petition for rehearing was filed after time show that whether within or without time for appeal was considered immaterial or there is nothing to indicate that the court considered the distinction to be of any importance.

- Aspen v. Billings* (1893), 150 U.S. 31, No. 4 at page
3 of "Supplemental Brief" herein.
- Foorhees v. Noye*, (1804), 151 U.S. 135, No. 60
at page 45 of "Supplemental Brief" herein.
- Kingman v. Western* (1898), 170 U.S. 675, No. 30
at page 24 of "Supplemental Brief" herein.
- United States v. Elliott* (1912), 233 U.S. 524, No.
56 at page 42 of "Supplemental Brief" herein.

A few decisions of the Circuit Courts of Appeals are here cited to show that the rule is generally followed in the lower courts.

- West v. McLaughlin* (1908), CCA 6, 162 Fed. 124,
No. 64 at page 52 of "Supplemental Brief"
herein.
- Cameron v. National*, (1921), CCA 8, 272 Fed. 874,
No. 11 at page 10 of "Supplemental Brief"
herein.

Harris v. Mills, (1939), CCA 10, 106 Fed. (2d) 976, No. 25 at page 20 of "Supplemental Brief" herein.

The rule is generally recognized by the bar. Hughes, "Federal Practice," Section 5698:

"The time within which an appeal may be taken begins to run from the date of entry of the judgment or decree, unless a petition for rehearing has been made at the same term, and is entertained by the court, in which case the time limited for an appeal does not begin to run until the application is disposed of, though this is at a subsequent term . . ."

The Chairman of the Supreme Court Advisory Committee in the formulation of the new Federal Rules of Civil Procedure said on the subject of a motion for rehearing:

"When it is denied, then you have your full time after that motion is denied to take your appeal. It does not merely cut out a section of time but it destroys the finality of the judgment, and even though the time for making a motion for a new trial under the rules has ended, if you make a motion for leave to file a motion for a new trial after the time has expired, even though it isn't seasonable, and the lower court entertains your motion on the merits and then decides it—that has obliterated the finality of the judgment and you don't have to take an appeal until the three months or thirty days, as the case may be, from the time the order is made denying your motion for a new trial." Quoted from the Statement of Honorable William D. Mitchell, Chairman, Supreme Court advisory committee, in the preparation of the Rules of Civil Procedure, reported in "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute," Cleveland, 1938, page 371.

It has often been held that a proceeding in bankruptcy is one suit from start to finish, that there are no terms in bankruptcy, and that a bankruptcy court may at any time reconsider any former action so that the time of the entry of the original order would have no effect on the time for appeal.

Sandusky v. National Bank, (1875), 90 U.S. (23 Wall.) 289, No. 47 at page 36 of "Supplemental Brief" herein.

Wayne v. Owens-Illinois (1937), 300 U.S. 131, No. 62 at page 46 of "Supplemental Brief" herein.

Borchard v. California, (1940), 310 U.S. 311, No. 8 at page 6 of this brief. Note: The principle was applied. This subject is not mentioned but several orders in the case entered in preceding years were held not binding on the parties and considered of no effect.

Circuit Courts of Appeals decisions:

In re Burr, (1914), CCA 2, 217 Fed. 106, No. 10A at page 10 of "Supplemental Brief" herein.

In the Matter of Pottasch, Central v. Irvin, (1935), CCA 2, 79 Fed (2d) 613, No. 40 at page 32 of "Supplemental Brief" herein.

In re Jayrose, (1937), CCA 2, 93 Fed. (2d) 471, No. 28 at page 22 of "Supplemental Brief" herein.

In re Albert, (1941), CCA 2, 122 Fed. (2d) 393, No. 1 at page 2 of "Supplemental Brief" herein.

In re Mercur, (1903), CCA 3, 122 Fed. 384, No. 32A at page 26 of "Supplemental Brief" herein.

In re Jemison, (1902), CCA 5, 112 Fed. (2d) 966, No. 28A at page 23 of "Supplemental Brief" herein.

In re Ives, (1902), CCA 6, 113 Fed. 911, No. 27 at page 22 of "Supplemental Brief" herein.

In re Hamilton, (1913), CCA 7, 209 Fed. 596, No. 23 at page 20, of "Supplemental Brief" herein.

This is the circuit to which certiorari is prayed in this cause.

First v. Belle Fourche, (1907), CCA 8, 152 Fed. 64, No. 18 at page 16 of "Supplemental Brief" herein.

Specification of Error 3.

The appellate court erred in holding that the district court had no jurisdiction to hear a petition for review of a void order of a conciliation commissioner unless such period for review was filed within ten days of the entry of such void order.

The order of August 13, 1940, for extra principal payments was made without notice to the farmer debtor or to any creditor (except of course the creditors presenting the motions on that day). It is void. R. 9, entry of August 13, 1940.

A few specific authorities upon this precise subject of hearing before a referee in bankruptcy proceedings will suffice.

Remington on Bankruptcy, in Section 27 relating to Celerity of Proceedings, says:

"While proceedings in bankruptcy may be summary, they should not be so summary as to deprive a party of those fundamental rights that belong to every citizen, among which are the rights to be advised by the demand made upon him, and after being so advised, to have a reasonable time to prepare his defense and produce his witnesses."

Likewise in his Chapter XXXVI on Summary Jurisdiction over the Bankrupt, Remington says in Section 2406:

"Reasonable notice must be served on the bankrupt or other party upon whom the order is requested so that he may have reasonable time to prepare for his defense."

In Section 2408:

"Due hearing must be had, and reasonable opportunity therefor is requisite."

In support of the foregoing statements Remington quotes at length from three opinions: (1), *In re Rosser*, No. 44 at page 35 of "Supplemental Brief" herein; (2) *Boyd v. Glucklich*, No. 9 at page 8 of "Supplemental Brief" herein, and (3) *In re Frank*, No. 19 at page 17 of "Supplemental Brief" herein. These decisions relied upon the decision of this Court in *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 368, No. 20 at page 18 of "Supplemental Brief" herein. Other decisions are in the same tenor: *Morgan v. U.S.*, 304 U.S. 1, No. 34 at page 28 of "Supplemental Brief" herein; *Holden v. Hardy*, 169 U.S. 366, 389, No. 26 at page 21 of "Supplemental Brief," and *Coe v. Armour*, 237 U.S. 413, 426, No. 15 at page 13 of "Supplemental Brief" herein.

Specification of Error 4

The appellate court erred in holding that the district court had no jurisdiction, while a farmer debtor proceeding was still pending, to hear a petition for review of an order entered by a conciliation commissioner, regardless of when such petition for review was filed.

It is to be remembered that the district court dismissed the petitions for review on the ground that it had no jurisdiction.

Please refer for authority for this specification to the preceding list of decisions "Specification of Error 3" holding that bankruptcy is one suit and there are no terms in bankruptcy, so that a bankruptcy court may reconsider an order at any time.

Specification of Error 5

The appellate court erred in holding that Section 39(c) of the Bankruptcy Act in naming ten days for the filing of a petition for review is a statutory limitation and not a rule of procedure.

Section 39(c) is subject to Section 2(10) and Section 38 of the Bankruptcy Act. That Section 39 (c) is the enactment of a rule of procedure which remains such is attested:

By Section 2(10) of the Act which provides that courts of bankruptcy are invested with original jurisdiction to consider and reverse or remand with instructions, the records, findings and orders of referees.

By Section 38 which makes the referees' jurisdiction and proceedings always subject to review by the judge.

The courts have overwhelmingly so held:

Second Circuit:

In re Albert, *Brooklyn v. Albert*, CCA 2, No. 1

Third Circuit:

at page 2 of the "Supplemental Brief" herein
Thummes v. Von Hoffman, CCA 3, No. 53 at page
 40 of the "Supplemental Brief" herein.

Sixth Circuit:

Miller v. Hatfield, CCA 6, No. 33 at page 26 of the "Supplemental Brief" herein.

The district court below has itself so held shortly before the final orders in this case were entered, *In re Madonia*, District Court Illinois, No. 31 at page 25 of the "Supplemental Brief" herein.

Other district court decisions have held the same:

In re Amsterdam, District Court New York, No. 2, at page 2 of the "Supplemental Brief" herein.

In re Ragozinno, District Court New York, No. 42 at page 34 of the "Supplementary Brief"

In re Fergus Falls, District Court Minnesota, No. 17 at page 16 of the "Supplementary Brief" herein.

Specification of Error 6

The appellate court erred in holding that Section 2(10) of the Bankruptcy Act is limited by Section 39(c) of that act.

Please see the authority listed under the preceding "Specification of Error 5."

Specification of Error 7

The appellate court erred in holding that Section 38 of the Bankruptcy Act is limited by Section 39(c) of that Act.

Please see the authority listed under the Preceding "Specification of Error 5."

Specification of Error 8

The appellate court erred in holding, in a farmer debtor proceeding pending before a conciliation commissioner where a petition for rehearing of an order is filed, no right having intervened, and said petition for rehearing is entertained by the conciliation commissioner who overrules a motion to dismiss it for lack of jurisdiction to entertain it, and considers the whole proceeding and then denies the petition, that the time for seeking a review of said order does not run from the date of the denial of such petition for rehearing.

This court has repeatedly stated in its twelve unanimous opinions upholding Section 75 that it was enacted for a purpose which may not be defeated by narrow constructions. They are:

Wright v. Finton (1937), 306 U.S. 400;

First v. Beach, (1937), 301 U.S. 435;

Adair v. Bank, (1938), 303 U.S. 350;

Wright v. Union, (1938), 304 U.S. 502;

John Hancock v. Bartels, (1939), 308 U.S. 180;

Gray v. Union, (1939), 308 U.S. 523;

Morrison v. Federal, (1939), 308 U.S. 524;

Kalb v. Feuerstein, (1940) 308 U.S. 433;

Borchard v. California, (1940), 310 U.S. 311;

Wright v. Union, (1940), 311 U.S. 273;

Benitez v. Bank, (1941) 313 U.S. 270;

Wright v. Logan, (February 2, 1942), — U.S. —

Section 75 differs in many important respects from the other four provisions for the relief of debtors.

(1) Section 75(q) provides that:

"A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto

arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section."

(2) "Any farmer failing to obtain the acceptance" to a composition or extension proposal "or if he feels himself aggrieved by the composition and/or extension, may amend his petition"

(3) Contrary to all other debtor provisions under Chapter VIII of the Bankruptcy Act there is no authority in Section 75 for dismissing a farmer debtor case.

(4) Contrary to all other such statutes there is no provision for finding that a farmer debtor petition is filed in good faith or dismissing it.

(5) The right of the farmer debtor to redeem may not be cut off by a request for a public sale. *Wright v. Union Central*, 311 U.S. 273.

(6) The statute quite clearly was enacted to accomplish a purpose. The ultimate goal is the opportunity of the farmer debtor to redeem after a three year stay under Section 75(s). That purpose can not be thwarted. By indirectly accomplishing a forbidden dismissal through the device of (1) a foreshortened stay and rental period, (2) unreasonable rent, (3) impossible principal payments, and (4) sale of all a farmer debtor's chattels so that he has not capital for earning the wherewithal for his rehabilitation, and then finally invoking the authority in Section 75(s) (3), to punish him for violation of the conciliation commissioner's orders and the provisions of the act, the conciliation commissioner would be doing indirectly what the statute and the decisions of this court prohibit being done directly.

Please also refer to the rule discussed under "Specification of Error 2". That rule was laid down in cases where the special purposes of Section 75 were not involved.

Specification of Error 9

The appellate court erred in hold that in a farmer debtor proceeding the period named in Section 39(c) of the Bankruptcy Act limits the time within which a petition for rehearing of an order may be filed with a conciliation commissioner, no right having intervened.

Specification of Error 10

The appellate court erred in holding that a conciliation commissioner in a farmer debtor proceeding may not entertain or consider a petition for rehearing of his order except when such petition is filed within ten days of the entry of the order, even though no right has intervened.

The purpose of Section 75 makes stronger the reasoning discussed under the previous heading "Specification of Error 1" and that under heading "Specification of Error 2" and that under heading "Specification of Error 5"

Specification of Error 11

The appellate court erred in sustaining the District Court in declining to hear, and dismissing, on the ground of lack of jurisdiction, a petition for review of the order of the conciliation commissioner which fixed the statutory stay and rental period in the farmer debtor proceeding to run from a date prior to the approval of the appraisal and prior to the order setting aside exemptions.

Specification of Error 12

The appellate court erred in sustaining the district court in declining to hear, and dismissing, on the

ground of lack of jurisdiction, a petition for review of the statutory order of the conciliation commissioner which stayed proceedings and permitted possession to be retained by the farmer debtor upon payment of rental, and made the time of such stay and possession less than three years.

Specification of Error 13

The appellate court erred in sustaining the district court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner which ordered sold as perishable property the farmer debtor's cows, bull, horses, sows, farm machinery and farm crops consisting of corn, soy beans, hay fodder, ensilage, oats, barley, rye and wheat.

Specification of Error 14

The appellate court erred in sustaining the district court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order by a conciliation commissioner ordering the farmer debtor to pay as rental and as payments on the principal of his debts, within 2 years, 8 months and 13 days, the total sum of \$12,750 where the appraisal of all the real estate is \$16,000 and the appraisal of all the unexempt chattels is \$1,786.

The orders referred to in specifications 11, 12, 13 and 14, were void because the conciliation commissioner had no authority to issue them:

The orders in (11) and (12) fixing the statutory stay and rental period and restricting possession and payment of rental to run from a date preceding the approval of the appraisal and the setting aside of exemptions were as void

as if a conciliation commissioner should fix the stay period to begin at a date more than three years preceding the entry of the stay order and then proceed to order a sale because the stay had terminated without redemption. Though there is a difference in amount of time there is no difference in principle between the orders actually issued and the supposed one.

The orders referred to in (13) which characterize the farmer debtor's livestock, farm machinery and farm crops as "perishable" and use that device to accomplish their immediate sale, ostensibly, without interfering with the statutory stay, possession and rental period, yet would effectually terminate it.

The orders referred to in (14) which fixed rental and principal payments in the total of \$12,750 to be paid in 2 years, 8 months and 13 days, to be earned from an 80 acre dairy farm appraised at \$16,000 for real estate and \$1,786 for chattels, the chattels having been ordered sold.

Such impossible orders are a nullity. If they may be accorded sanctity because issued by a conciliation commissioner in the administration of the farmer debtor law which enjoins upon him the execution of a trust if the farmer debtor confides in him [Section 75 (q)], then there is no farmer debtor law because it creates its own self destruction.

This court said in *Mitchell v. St. Marc* (1866), 71 U.S. (4 Wall) 237: "Void process confers no right on an officer to sell property and all acts done under it are absolute nullities". In *Gaines v. Orleans* (1868), 73 U.S. (6 Wall.) 642, this court said: "Where sales were irregular, but those who bought the property did it in good faith and without notice, they are not protected except by the bar of time prescribed by the law."

So in *Williamson v. Berry* (1850), 49 U.S. (8 How.) 495 541, this court said: "But if it [a court] act without authority, its judgments and orders are nullities;" To the same effect: *Gantley v. Ewing*, (1845), 44 U.S. (3 How.) 717, 713, 714, 715; *Voorhees v. Jackson* (1836) 35 U.S. (10 Pet.) 449, No. 59 at page 45 of the "Supplemental Brief" herein; *Thompson v. Tolmie*, (1829), 27 U.S. (2 Pet.) 157, 163.

Specification of Error 15

The appellate court erred in sustaining the district court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner, when proceedings for obtaining such review had been perfected by the filing of a petition for review by a person aggrieved by such order and the serving of a copy of said petition upon the proper adverse parties, and when the conciliation commissioner had duly prepared and transmitted to the clerk his certificate on said petition for review, all in compliance with Section 39(c) of the Bankruptcy Act, such dismissal being based upon the sole reason that said petition for review was not filed within ten days after the original entry of the order complained of.

Again, it is to be noted that the district court dismissed the petitions for review for **lack of jurisdiction** and the appellate court sustained those dismissals.

Section 2(10) specifically invests the district court "with such jurisdiction . . . as will enable them to exercise original jurisdiction . . . to . . . consider records, findings and orders certified to the judges by referees"

Now the conciliation commissioner duly certified his records, findings and orders to the judge and the judge had statutory jurisdiction to consider them.

CONCLUSION.

To the petitioner it appears to be evident that the decision below calls for the interpretation of the several statutes of the United States involved therein; that the decision of the court below is in conflict with the decisions of several other Circuit Courts of Appeals; the court below has decided important questions of federal law which have not been, but ought to be, settled by this court; it has decided the various federal questions referred to in a way conflicting with applicable decisions of this court; and has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the district court, as to call for this court's exercise of its power of supervision.

Respectfully submitted,

ELMER McCLAIN,

Counsel for Petitioner.

Lima, Ohio, .

February 12, 1942



FILE COPY

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FEB 17 1941

CHARLES ELMORE

IN THE
Supreme Court of the United States

OCTOBER TERM 1941

No. ~~958-959~~ 26-27

HENRY ANTON PFISTER,

Petitioner,

v.

NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HART-
MAN AND SON, E. C. HOOK, and EMIL
GEEST,

Respondents.

**SUPPLEMENTAL BRIEF TO ACCOMPANY
BRIEF.**

On Application for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit

ELMER McCLEIN,
Lima, Ohio

Counsel for Petitioner.

INDEX OF CASES.

The index of cases which was to have been printed here was inadvertently printed in the petition and brief beginning at page iv. Therefore the cases discussed in this supplemental brief will be found indexed at pages iv to vi of the petition and brief.

As all of the cases included in this supplemental brief are placed in alphabetical order they may be readily found without an index.

IN THE
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**SUPPLEMENTAL BRIEF TO ACCOMPANY
BRIEF.**

As indicated in the Brief, a large number of questions are presented. The decided cases involved are numerous and the majority of them pertain to several of the questions presented. To avoid repetition of quotations and discussions in the course of the argument, all the cases referred to are here digested in alphabetical order in one group. Each citation is given a number and reference to each citation in the brief is indicated by its number and the page of this Supplemental Brief on which it is digested.

NOTE: Cross references between cases in this Supplemental Brief are indicated by the phrase "No. — page — of this brief".

ALPHABETICAL LIST OF CASES CITED IN THE BRIEF.

No. 1. *In re Albert, Brooklyn v. Albert*, CCA 2 (1941)
122 Fed. (2d) 3931.

From the opinion:

"The jurisdiction of the bankruptcy court when invoked by the filing of the petition continues until the estate is closed. Its power to review orders of referees flows from section 2(10) of the Act and nothing in section 39 (c) expressly limits that power."

"Before section 39(c) took effect, General Order 27, now abrogated, and local rules applied. Under General Order 27 a petition to review, if filed within a reasonable time after the entry of the order, was to be heard as a matter of right."

"And as section 39(c) of the Act neither in terms or by necessary implication curtails the jurisdiction of the court, it follows that the court has the unimpaired power to exercise that jurisdiction as formerly in respect to petitions to review orders of referees."

No. 2. *In re Amsterdam*, District Court New York (1940), 35 Fed. Supp. 618.

From the opinion:

"Undoubtedly, it is true that, although Section 39(c) provides that a petition for review may be filed by the party aggrieved within ten days after the entry thereof or within such extended time as the court may for cause shown allow, the court may nevertheless extend the time after the ten day period has elapsed."

No. 3. *Andrews v. Virginian*, (1919), 248 U. S. 272. A judgment was rendered by a county court of the State of Virginia on June 16, 1916. A writ of error was denied by the state court of appeals "declining to take jurisdiction" on November 13, 1916. Review of the judgment of the County Court was then sought in this court. The question for decision was when did the judgment of the County Court become final? It was held that the judgment of the County Court was a final judgment on November 13, 1916; when the state Court of Appeals declined to take jurisdiction for review.

At page 275 this court said:

"Undoubtedly, before the action of the Court of Appeals the judgment was not final, and was susceptible of being reviewed and reversed by that court."

"It is true that under the law of Virginia in a case like this the power of the Court of Appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the Court of Appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court."

No. 4. *Aspen v. Billings* (1893), 150 U. S. 31. Time for appeal six months. Petition for rehearing filed within time in five days. It was argued that the appeal to this court came too late.

Beginning at page 36 the court said:

"The decree dismissing complainants' bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891."

The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment of decree does not take final effect for the purposes of the writ of error or appeal. *Brockett v. Brockett* [No. 10 page 9 of this brief]; *Texas and P. R. Co. v. Murphy* [No. 52 page 39 of this brief]; *Memphis v. Brown* [No. 32 page 26 of this brief].

If this case falls within that category, then the six months within which the appeal had to be taken under Section 11 of the Judicial Act of March 3, 1891, did not commence to run until May 5, 1891, and the appeal was in time.

It is true Equity Rule 88 provides that 'no rehearing shall be granted after the term at which the final decision of the court shall have been entered and recorded, if an appeal lies to the Supreme Court'; but if this petition for rehearing was filed in season, and entertained by the court, then the decree, although entered in form, did not discharge the parties from the attendance in the cause, and they were bound to follow the petition thus pending to the next term. The suit was thereby prolonged until the application was disposed of in the regular course of proceeding. This is expressly so ruled in *Phillips v. Ordway* (*Godard v. Ordway*) [No. 21 page 18 of this brief].

"The decree does not in legal effect remain final while the petition is pending and the prescript of Rule 88 must be construed to mean that a rehearing can not be granted after the lapse of the term unless application is made therefor during the term and being entertained. The decree is thereby prevented from passing beyond the control of the court."

"But it is said this cannot be the result under either statute or rule of the mere filing of a motion or peti-

tion for rehearing and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that, since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance and during the term at which the decree was pronounced."

No. 5. *Benitez v. Bank*, (1941) 313 U. S. 270. In a farmer debtor proceeding a creditor moved to dismiss the petition on the ground that the petitioner was not a "farmer" claiming that the definition of a "farmer" in Section 1 (17) of the Bankruptcy Act as amended by the Chandler Act of 1938 superceded the previously enacted definition of a "farmer" in Section 75 (s) of the Bankruptcy Act. Section 75(r) reads: "For the purpose of this section and section 4(b) the term 'farmer' includes", etc., etc.

This court said:

"The argument ignores the plain import of Section 75(r). The meaning of the phrase 'for the purposes of this section' is hardly open to question."

"Designed for a particular purpose, the relief of hard-pressed farmers, it was regarded as a special temporary enactment."

"Naturally enough, legislation drafted for such a purpose carried its own test for determining the persons to whom it should apply."

"We conclude that petitioner's activities must be tested by the definition in Section 75(r) rather than by the one in Section 1 (17) "

No. 6. *Boesch v. Graff* (1890), 133 U. S. 697. On appeal in a patent case this court said, at the beginning of the

opinion, that the error complained of "which goes upon the refusal of the Circuit Court to grant a rehearing not being open to consideration here."

No. 7. *Bonner v. Potterf*, CCA 10 (1931), 47 Fed. (2d) 852. Referee in bankruptcy denied claim. On petition for review the referee was sustained by the district court. After time for appeal had expired a motion was presented to the district court to re-refer the claim for a decree on final hearing. The district court overruled the motion for re-reference and indicated that the original order would be reentered to give opportunity to appeal.

The court said:

"It is therefore apparent that the act of the court was simply a re-entry of the original order for the sole purpose of saving the rights of the appellant in regard to appeal which, under such circumstances, is a matter beyond the sound discretion of the trial court."

No. 8. *Borchard v. California*, (1940), 310 U. S. 311.

At page 317 this court said:

"That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his **possession for three years from the date of the order**, upon the conditions mentioned in the Act. As a prerequisite to an intelligent determination of the terms under which the debtor is to remain in possession, the statute requires that the court and the parties shall be informed of the fair value of the property."

From p. 315:

May 27, 1936 the farmer debtors and creditor stipulated and the District Court held that payments be made direct from farmer debtors to creditor.

June 10, 1937 a similar stipulation was entered into and ordered.

December 20, 1937 a similar stipulation was again entered into and ordered.

March 7, 1938 a similar stipulation was effected.

May 24, 1938 the farmer debtors petitioned for appraisal and stay but upon petition of the creditor the Court ordered the property sold. The farmer debtor then appealed.

This Court held that the previous stipulations and orders were ineffective to constitute the statutory stay period.

Page 317:

"Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consent to the retention of possession by the debtors and arranged that they should cooperate in the cultivation of the farm, proceeds of the crops being used for further cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors."

No. 8A. *Bowman v. Loperena*, (1940), 311 U. S. 262.

This was a proceeding under Section 74 of the Bankruptcy Act for the relief of individual debtors. The procedural facts are involved. For the present purpose they were as follows:

The District Court entered an order of adjudication on August 21, 1936. The time for appeal expired in thirty days on September 20, 1936. More than a year later on November 15, 1937, a petition for rehearing was filed out of time and not disposed of by the District Court until February 17, 1938, when it was denied. On appeal, taken on March 18, 1938, which was twenty-nine days after the petition for rehearing was denied, the Appellate Court

held that the time for appeal from the district court had long since expired. This court granted certiorari, and at page 266 of the opinion said:

“Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the **petition of November 15, 1937, as a second petition for rehearing filed out of time**, the endorsement upon the latter by a judge of the court, and the hearing held and the opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.

These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits or a motion for leave to file such a petition out of time, if not acted on or, if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing, and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial and the time for appeal runs from the date thereof.”

The opinion cited:

Wayne v. Owens, Illinois, No. 62 page 46 of this brief;

Gypsy v. Escoe, No. 22 page 19 of this brief;

Morse v. United States, No. 35 page 29 of this brief.

No. 9. *Boyd v. Glucklich*, CCA 8 (1902), 116 Fed. 131. A referee in bankruptcy issued notice of the first creditors meeting. The bankrupt received the notice. At the creditors' meeting the referee issued an order to the bankrupt to turn over certain money. Upon petition for review the order was sustained.

Upon appeal the Appellate Court said:

"Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt."

No. 10. *Brockett v. Brockelt*, (1844), 43 U. S. (2 How.) 238. Time for appeal ten days. Petition to open decree filed after time in sixteen days. Referred to master. Report of master. Court refused to open decree. Appeal to this court. Motion to dismiss because time to appeal had expired.

At page 240:

"The next ground is, that an appeal has been taken from the refusal of the court below to open the former decree, rendered for the appellant. It is plain that no appeal lies to this court in such a matter, as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree (which was a final decree) rendered by the court. That decision was rendered on the 10th day of May, 1843. During the same term a petition was filed by the defendants on the 26th day of the same month, to have the final decree

opened for certain purposes; and the court took cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

Now the argument is that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is that the final decree of the tenth of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given ten days from this last period."

No. 10A. *In re Burr*, CCA 2 (1914) 217 Fed. 16.

"It is of course, true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy and the principle which the learned counsel invokes that a court has no power to vacate its order other than at the term in which it was granted is inapplicable to the facts in this case."

Cites:

Sandusky v. First National, No. 47 at page 36 of this brief.

No. 11. *Cameron v. National* (1921), CCA 8, 272 Fed. 874. Adjudication of bankruptcy. Time for appeal ten days. After fourteen days petition to vacate. Adjudication vacated. Thereafter second order of adjudication and ap-

peal therefrom within ten days. Argued that the Appellate Court had no jurisdiction because the petition to vacate was not filed "within the time allowed for an appeal." It was held that the first adjudication was vacated and that the appeal was from the second adjudication. "We therefore have jurisdiction".

No. 12. *Carpenter v. Condor*, (1939) 108 Fed. (2d) 318.

Page 318: "The time for appeal began to run upon the denial of the petition for rehearing, although it would have been otherwise had the petition not been entertained."

The opinion cites *Morse v. United States*, No. 35 page 29 of this brief in which the petition for rehearing was filed long after the time for appeal had expired.

No. 13. *Chicago v. Basham* (1919) 249 U. S. 163. The Supreme Court of the State of Iowa affirmed a state court decision on November 26, 1915. Petition for rehearing was overruled on April 17, 1916. A second petition for rehearing was overruled on December 18, 1916.

On a writ of error to this court the question was when the judgment of the Supreme Court of Iowa became final. This court held that it was not final until the second petition for rehearing was denied.

At page 167 this court said:

"It is only a judgment marking the conclusion of the course of the litigation in the courts of the state, that is subject to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to, and entertained and considered by the court, we must take it that, by the practice prevailing in the state, the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously ren-

dered cannot be regarded as a final judgment within the meaning of the act of Congress. It results that in the present case the judgment of the Supreme Court of the state of Iowa did not become a 'final judgment' until December 18, 1916, . . ."

This court cited *Andrews v. Virginian*, No. 3 at page 3 of this brief.

No. 14. *Citizens v. Opperman* (1919), 249 U. S. 448. Replevin by judgment in state court. A petition for rehearing was overruled on May 18, 1917. The case came to this court on error.

This court said at page 449:

"A petition to rehear was overruled May 18, 1917 and at that time the judgment below became final for purposes of review here."

Page 450:

"Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition."

The court cited:

Andrews v. Virginian, No. 3 page 3 of this brief;

Chicago v. Basham, No. 13 at page 11 of this brief.

No. 14A. *Clarke v. Hot Springs*, 10 CCA, (1935) 76 Fed. (2d) 918.

"A petition for rehearing seasonably filed within the time for appeal will toll the time for appeal. But the petition was not filed within time for appeal. A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, even after the time for appeal has expired, the trial court may

grant it, thus vacate the decree and start again. But if the rehearing is denied, the original decree stands, and the right of appeal is not revived. All this has been carefully spelled out by the courts."

No. 15. *Coe v. Armour*, 237 U. S. 413.

Page 426:

"In doing this the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice."

No. 16. *Conboy v. First National* (1906), 203 U. S. 141, 146. District Court affirmed allowance of claim in bankruptcy. Circuit Court of Appeals affirmed January 23, 1905. Time to appeal to Supreme Court thirty days. Petition to recall mandate filed April 25, 1905. Denied. Petition for rehearing of the original affirmance was filed May 8, 1905. Denied May 24, 1905. Appeal allowed by a Justice of the Supreme Court May 27, 1905. The appeal was dismissed.

The opinion contains this statement at page 145:

"The cases cited for appellant, in which it was held that an application for a rehearing made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired."

The cases cited do not support that statement. There were eight of them:

Brockett v. Brockett, No. 10 page 9 of this brief;

Aspen v. Billings, No. 4 page 3 of this brief;

Voorhees v. Noye, No. 60 page 45 of this brief.

Slaughter House Cases, No. 49 page 37 of this brief;

Washington v. Bradley, No. 61 page 46 of this brief.

Memphis v. Brown, No. 32 page 26 of this brief;

Texas v. Murphy, No. 52 page 39 of this brief.

Kingman v. Western, No. 30 page 24 of this brief.

The total result of an examination of the citations referred to in the *Conboy* opinion just quoted is that in four of the cases (*Brockett v. Brockett*, No. 10 page 9 of this brief; *Washington v. Bradley*, No. 61 page 46 of this brief; *Slaughter House cases*, No. 49 page 37 of this brief), and *Memphis v. Brown*, No. 32 page 26 of this brief) the application for rehearing came after time for appeal. In one case (*Texas v. Murphy*, No. 52 page 39 of this brief), it is not shown when the application was filed, but time for appeal was sixty days and the application was disposed of in 126 days and the decisions cited and followed and the reasoning in the opinion were based on applications made after time for appeal. See the digest of *Texas v. Murphy*, No. 52 page 39 of this brief. In the three other cases cited to the court in the *Conboy* case (*Aspen v. Billings*, No. 4, page 3 of this brief; *Voorhees v. Noye*, No. 60 page 45 of this brief; and *Kingman v. Western*, No. 30 page 24 of this brief, the application came within time for appeal.

It is very clear that the *Conboy* case was not properly presented for the cases rejected by the court were five to three against the decision. This court in *Wayne v. Owens-Illinois* (No. 62 page 46 of this brief) was justified in saying in Note 2 that the *Conboy* case "adverted to the question without deciding it."

The Appellate Court at R. 213 made this statement:

"Appellant's petition for rehearing was filed merely for the purpose of reviewing and extending the time for filing a petition for review, under which state of facts the court in the *Wayne* case said an appeal

should be dismissed. The leading case on this subject seems to be *Conboy v. First National Bank*, 203 U. S. 141, [No. 16 page 13 of this brief] where the question is fully discussed."

Counsel for the petitioner has made a minute study of the *Conboy* case, including copies of papers in the files, eliciting the foregoing and the following facts about it.

Contrary to the statement from the opinion of the Appellate Court just quoted, the *Conboy* opinion does not discuss the subject of a petition for rehearing filed merely to create time for appeal. It flatly decides that a petition for rehearing filed after time for appeal has expired does not extend the time for taking appeal. The nearest it comes to the subject of a petition for rehearing filed "merely" to extend time for appeal is in these words:

Page 145:

"Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing."

Here are the facts:

January 23, 1905—Order of Circuit Court of Appeals affirming District Court.

February 20, 1905—This court decided *Western v. Brown*, 196 U. S. 502.

February 22, 1905—Thirty days for appeal expired.

April 25, 1905—Petition to recall mandate filed. This petition averred that the mandate had issued without notice, that on hearing of it the appellant, a trustee in bank-

ruptcy, called a meeting of the creditors on March 3, 1905, to be held March 30, 1905. That while the creditors' meeting was pending he heard of the decision of this court in *Western v. Brown*, 196 U. S. 502, which established a different rule of applicable law.

May 8, 1905—Petition for rehearing filed, setting up the applicable rule announced in *Western v. Brown*, 196 U. S. 502, decided February 20, 1905 and published March 15, 1905.

Now, as the decision in *Western v. Brown*, 196 U. S. 502, was not announced until February 20, 1905, and published March 15, 1905, it could not be said that the appellant could have made his application for hearing "and had it determined within thirty days and still have had time to take his appeal." The fact is that the *Conboy* decision is a lonely minority among the numerous decisions made long before and since holding the opposite.

No. 17. *In re Fergus Falls*, District Court, Minnesota (1941) 43 Fed. Supp. 355. Upon objection to a petition for review, it was asserted that the time for filing it had expired before it was filed and that the referee had no power to grant an extension of time. The court held that a petition for review may be filed after the lapse of more than ten days from the date of the entry of the order to be reviewed. The referee had authority to extend the time for filing such petition.

No. 18. *First v. Belle Fourche*, CCA 8 (1907), 152 Fed. 64.

From page 74 of the opinion:

"A proceeding in bankruptcy is a continuous suit. There are no terms in the bankruptcy court. It is al-

ways open and until the termination of the pending suit that court has the power to reexamine its orders therein upon a timely application in an adequate form."

The opinion cited:

Sandusky v. National Bank, No. 47 at page 36 of this brief.

No. 19. *In re Frank*, CCA 8. (1910), 182 Fed. 794. A referee in bankruptcy issued notice of the first creditors' meeting. The bankrupt had notice. At the meeting the trustee presented a petition for an order on the bankrupt to turn over the money. The referee issued an order on the bankrupt to appear within three days to show cause why he should not comply. On the day set the bankrupt presented objections to the form of the petition which were overruled and he was ordered to stand by ready to appear. On the next day the matter was continued. After three days witnesses were examined by deputy in absence of the bankruptcy and without notice.

On appeal the Appellate Court said:

"It is true that the case before us differs from the *Russer* case in that the petitioner here was given two days' notice of the hearing upon the petition filed by the trustee. But that petition was based upon alleged disclosures of the petitioner when under examination before the petition was filed, and when he had no notice that his examination was to be used or would be used upon the hearing of the petition that was subsequently filed; and afterwards further testimony was taken to be used against him upon the hearing, no notice of the taking of which was given and no opportunity afforded him to appear and cross-examine the witnesses; in fact it appears that the petitioner was detained at Minot, N. D., by order of the referee at the instance

of the trustee while such testimony was being taken. It therefore clearly appears that the order of the referee deprived the petitioner of his legal rights, and in respect of the taking of the testimony is in effect the same as the order in *Re Rosser*."

No. 20. *Galpin v. Page*, 85 U. S. (18 Wall.) 350.

Page 368:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

No. 21. *Goddard v. Ordway* (*Phillips v. Ordway*) (1880), 101 U. S. (11 Otto) 745. Appeal from a United States Court to this court. After appeal was allowed but within term a motion was made to vacate the order appealed from and for reargument.

The court said:

At page 1042 of the L. Ed. (25 L. Ed. 1040):

"The objections urged to the jurisdiction were: 1. that a court cannot reverse or annul its final decrees or judgments for error of fact or law after the term at which they were rendered;" . . . "So far as the first objection is concerned, it is sufficient to say that the motion to vacate the order of affirmance and grant a reargument was made to and recognized by the court at the same term the order was entered, and before a final adjournment. This is evident from the fact that the motion was entered on the minutes of the doings of the court for the Term. A paper may be filed in the proper office and yet not brought to the attention of the court while sitting in judgment, but

when what it calls for appears on the minutes of actual proceedings, it must be presumed that the court, in some form, gave it judicial attention, and that it was presented in some regular way."

"The motion, when entertained, prolongs the suit, and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding."

No. 22. *Gypsy v. Escoc* (1927), 275 U. S. 498.

"Per Curiam: This petition for certiorari to the supreme court of the state of Oklahoma is denied.

The application was not made in accordance with Section 8(a), Act of February 13, 1925, which provides: 'No writ of error, appeal, or writ of certiorari shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree. . . .'

The judgment of the Supreme Court was entered March 22, 1927. A timely petition for rehearing was denied June 14, 1927. On June 18, 1927, an application for leave to file a second petition for rehearing was indorsed:

'Leave granted to file—Fred C. Branson, Chief Justice.'

On August 2, 1927, as appears from the minutes, the following proceedings were taken by the court: '*Gypsy Oil Company v. Escoc, et al.* Application for leave to file a second petition for rehearing denied; application for oral argument denied. Fred C. Branson, Chief Justice.'

On September 30, 1927, more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.

The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a

petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing.

If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

No. 23. *In re Hamilton*, CCA 7 (1913), 209 Fed. 596.

From page 598 of the opinion:

"We are of the opinion that so long as the bankrupt's estate is pending in the court and unsettled, the court has, under the bankruptcy Act, and especially under Section 2, Chapter 2 thereof, power over its orders and records as to the disposition of claims, to modify the same to conform to the rights of the parties, and that therefore the referee was not, in the present case, estopped from permitting said amendment and to the allowance of the claim in accord with the prayer of the amended petition, by his former order disallowing the claim as then presented."

No. 24. *Hardin v. Boyd*, 1885, 113 U. S. 756. Suit to set aside conveyance. Petition for rehearing.

This court said at the end of the opinion:

"... it is sufficient to say that the granting of a rehearing was a matter within the discretion of the court below and not to be reviewed here."

No. 25. *Harris v. Mills*, CCA 10 (1939), 106 Fed. (2d) 976.

"By order dated December 2 and filed December 15, 1938, the court found that the bankrupt was not a wage earner and denied the motion to dismiss; by order

dated January 18, and filed January 30, 1939, the court denied the motion of the bankrupt for a rehearing on the motion to dismiss; . . . "

"The petitioning creditors lodged in this court a motion to dismiss the appeal on two grounds. The first is that the appeal from the order of December 2, finding that the bankrupt was not a wage earner and denying the motion to dismiss the petition, was not taken within the time allowed by section 25 of the Bankruptcy Act."

"Here a motion to set aside the order dated December 2, and to grant a rehearing on the motion to dismiss the petition, was filed December 9, and not disposed of until January 18, 1939. Treating the order of December 2 as a reviewable order, we think the time within which to appeal therefrom was suspended during the pendency of the motion for rehearing. The appeal was seasonably perfected after the denial of that motion. But the motion for rehearing was addressed to the sound judicial discretion of the trial court, and its denial is not the subject of appeal."

Citing:

Wayne v. Owens-Illinois, No. 62 at page 46 of this brief.

No. 26. *Holden v. Hardy*, 169 U. S. 366.

Page 389:

"It is sufficient to say that there are certain immutable principles of justice which adhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

No: 27. *In re Ives*, CCA 6 (1902), 113 Fed. 911.

At page 913 of the opinion it is said:

"Under the Bankruptcy Act of 1867 the District Court . . . is always open and has no separate terms; proceedings in a pending suit are open for reexamination . . . and any order made in the progress of the case may be subsequently set aside . . . provided rights have not become vested under it which would be disturbed by its vacation; . . . this language used in referring to the Act of 1867 was said by this court to be applicable to the present act" [of 1898] . . . "We are of opinion therefore that the question presented by the petitioner was open, and the court below had power to determine it although several terms of the district court had expired since the adjudication."

The opinion cited:

Sazdusky v. First National, No. 47 at page 36 of this brief.

No. 28. *In re Jayrose*, (CCA 2) (1937), 93 Fed. (2d) 471. Referee's order in 1936 denied priority of claim and allowed as a general claim. No petition for review was filed by the creditor. More than a year later the creditor orally applied at a creditors' meeting for priority on the basis of a subsequent decision of this court. The referee denied the application and reported to the District Court which ruled that the creditor was estopped. There was no allowance of a rehearing, merely a denial of the application to revise the original order. The creditor appealed. Eleven months after the decision of this court in *Wayne v. Owens-Illinois* the Circuit Court of Appeals for the Second Circuit in its opinion said: ". . . it is settled here that referees have power to grant rehearings even after the time for review of their orders by the District Court has expired . . ."

"Although no appeal lies from a denial of a rehearing, an order entered upon a granted rehearing is appealable, although the court reaffirm its former action. Although not in form a motion for a rehearing of the prior orders of allowance, in effect it was just that. . . . "While no formal order was entered reaffirming his prior action in allowing the claim as a general claim, his report to the court may be considered an indirect order to that effect" "The court should have modified and corrected the referee's report The court has jurisdiction to make that correction and it is ordered."

No. 28A. *In re Jemison Mercantile Company*, CCA 5 (1902) 112 Fed. (2d) 966.

"In . . . bankruptcy proceedings no such limitation obtains or rather the whole period from the filing of the petition to the final settlement of the proceedings constitutes but one term."

Cites:

Sandusky v. National Bank, No. 47 at page 36 of this brief.

No. 29. *John Hancock v. Bartels*, (1939), 308 U. S. 180.

At page 185 this court said:

"The procedure under subsection (s) is intended to protect all interests. It provides, in paragraph (1), that after the value of the debtor's property has been fixed by the prescribed appraisal, the referee shall set aside the debtor's unencumbered exemptions and direct his retention of possession of the rest of his property subject to all liens and to the court's supervision and control. Under paragraph (2), if there has been compliance with the statutory conditions, **the court is directed to stay all proceedings against the debtor or his property for a period of three years, and during**

that time the debtor may retain possession of all or part of his property subject to the court's control, provided he pays a reasonable rental semi-annually.

No. 30. *Kingman v. Western*, 170 U. S. 675, 678. Time for application for certiorari six months. Rule required motion for new trial within three days. It was filed in two days.

At page 678:

"The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common-law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error on appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

Here the opinion cited

Aspen v. Billings, No. 4 page 3 of this brief;
Forbes v. Noye, No. 60 page 45 of this brief;
Brckett v. Brckett, No. 10 page 9 of this brief;
Texas v. Murphy, No. 52 page 39 of this brief;
Memphis v. Brown, No. 32 page 26 of this brief.

all of which state the general principle that an application for rehearing, whether filed before or after time for appeal suspends the finality of the order until the application for rehearing is ruled upon.

No. 31, *In re Madonia*, District Court Illinois (1940)
32 Fed. Supp. 165.

Note: This opinion is by the same judge, of the same court, who shortly thereafter issued the inconsistent orders in this *Pfister* case dismissing petitions for review on the ground that the court was without jurisdiction to hear them.

From the opinion:

"Section 39(c) of the Chandler Act provides:

"(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy thereof upon the adverse party who were represented at such hearing . . ."

It is the position of the trustee that the provisions for filing the **petition for review** and serving a copy upon the adversary are jurisdictional and that if the petition is not filed and the copy served within the ten day period (unless the court has within the ten days granted an extension) the **referee is without power to grant the petition or the judge to hear it.**

I cannot agree. Statutes granting a right of review of the order of a court should be liberally construed, so that if error occurs it may be corrected.

Here the statute gives the court power to extend the time within which the petition should be filed, and the court's power in this respect is not limited to the ten-day period. I am of the opinion that the court has discretion, within reasonable limits, to grant the extension after the expiration of the ten day period. The Circuit Court of Appeals of the Third Circuit has so held."

No. 32. *Memphis v. Brown* (1877), 94 U. S. (4 Otto) 715. Time for writ of error sixty days. Motion to set aside thereafter in seventy-eight days.

"Under the ruling in *Brockett v. Brockett* [No. 10, page 9 of this brief], the motion made during the Term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20 when the motion was disposed of."

No. 32A: *In re Mercur*, CCA 3 (1903) 122 Fed. 384.

"As a preliminary matter it may be observed that there is no such finality to the proceedings that we can not even at this late state revise and amend them if otherwise authorized. The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities."

Cites:

Sandusky v. First National, No. 47 at page 36 of this brief.

No. 33. *Miller v. Hatfield*, (CCA 6), (1940), 111 Fed. (2d) 28. A conciliation commissioner ordered a farmer debtor to pay into court within thirty days a sum as rental which the farmer debtor withheld as having spent for upkeep of the estate. Upon default of payment the conciliation commissioner ordered liquidation and appointed a trustee under Section 75 (s) (3) who filed a petition to sell to which the farmer debtor filed an answer. The answer was stricken because previous orders had been violated and no petition for review had been filed and time had expired for doing so. Sale was ordered and a petition for review of it and of the previous orders was filed.

The District Court denied the petition for review for lack of jurisdiction. The Appellate Court reversed the Dis-

trict Court. The following is quoted from the opinion of the Appellate Court.

"Under section 39(c), of the Bankruptcy Act as amended by the Act of June 22, 1938, 'a person aggrieved by an order of a referee may, within ten days after the entry thereof or may within such extended time as the court may, for cause shown, allow, file with the referee a petition for review of such order.'

Before the enactment of the above statute in districts where local rules of court prescribed a definite period for filing of petitions for review or thereafter by leave of court where proper cause therefore was shown the courts entertained petitions which had not been filed until after the expiration of the arbitrary period."

"The question for decision is whether the orders of September 27 and November 8, 1937, are of such finality as to prohibit the conciliation commissioner from granting a rehearing. There is some conflict of opinion in regard to the power of a referee in bankruptcy over his own orders, but we believe the correct rule as applied to farmer-debtor proceedings is that the conciliation commissioner has the same power to vacate his order as has a court during the term and as the bankruptcy court has no term, the conciliation commissioner has the power to vacate any order entered during the course of the proceedings unless rights have intervened which it would be inequitable to disturb."

"Appellant's objection to the order of sale was substantially a petition for rehearing on the two provisional orders and in our opinion, no intervening rights appearing and diligence being shown, the conciliation commissioner, upon the application was authorized to, and should have, granted a rehearing on the merits. The two orders which appellee insists were of such finality as to start the period of limitation for

filing petition for review were preliminary to the order of sale and were so closely intertwined with it as to justify the conclusion that there was but one final order which was the one of sale of January 18, 1938, and the time for filing the petition for review to the judge ran from the date of its entry.

Bankruptcy procedure on the whole is void of legal technicalities and flexible to accomplish its purpose of administering substantial justice. In ordinary bankruptcy, it is important that the estate should be administered promptly to the end that the debtor's property should be distributed to his creditors and the bankruptcy discharged. Section 75(s) presupposed the farmer would continue his business and in the very nature of such proceedings; it is essential, in carrying out the purpose of the Act, that wide latitude be given to the conciliation commissioner to revise and review orders entered in the course of the proceedings relating to the business of the bankrupt with due regard to the rights of vested interests.

It follows from this that the lower court had jurisdiction to review the orders of the conciliation commissioner and erred in not considering the petition on its merits.

The opinion cites:

Re Pottash Brothers Company, No. 40 page 32 of this brief;

Wayne United Gas Co. v. Owens-Illinois Glass Company, No. 62, page 46 of this brief.

In re Jayrose Millinery Co., No. 28, page 22 of this brief.

No. 34. *Morgan v. United States* (1938), 304 U. S. 1.

The validity of an order of an executive department was involved. There were legal notice, taking of testimony by examination and cross examination, oral arguments, briefs.

findings, rehearing, a new hearing, more oral argument and more briefs. The findings were then issued without first presenting them to the parties concerned.

This Court continued a long history of judicial pronouncements by holding that even in an administrative proceeding which is only quasijudicial in character, the liberty and property of citizens must be protected by fair and open hearing. In that case there was an open hearing and argument but there was no opportunity given to the person involved to examine the order before it was issued.

At page 18, the Court said:

"The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

No. 35. *Morse v. United States* (1926), 270 U. S. 151. Time for appeal three months. Motion for new trial filed within time in one month and twenty-six days. Overruled.

Rule of court required leave of court to file motion for new trial after ninety days. Motion for leave filed after ninety days and denied. It was argued that filing a motion for leave to file a motion for new trial stopped the running of time for appeal.

Page 153: "There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition."

Page 154: "The suspension of the running of the period limited for the allowance of an appeal, after

a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing. In this case, after the first motion for a new trial had been overruled, on May 4, 1924, no motion for a new trial could be duly and seasonably filed under Rule 90 of the court of claims, except upon leave of the court of claims. This leave, though applied for twice, was not granted. Applications for leave did not suspend the running of the ninety days after the denial of the motion for a new trial within which the application for appeal must have been made."

The opinion cites eight cases:

Brockett v. Brockett, No. 10 page 9 of this brief;
Washington v. Bradley, No. 61 page 46 of this brief;

Memphis v. Brown, No. 32 page 26 of this brief;

Texas v. Murphy, No. 52, page 39 of this brief;

Aspen v. Billings, No. 4 page 3 of this brief;

Kingman v. Western, No. 30 page 24 of this brief;

U. S. v. Ellicott, No. 56 page 42 of this brief;

Andrews v. Virginian, No. 3 page 3 of this brief;

and

Chicago v. Basham, No. 13 page 11 of this brief, all of which, as shown, establish the general principle relied upon.

This decision now being digested (*Morse v. United States*) clearly distinguishes between an application for rehearing and an application for leave to file an application for rehearing. In *Gypsy v. Escoe* (1927) (No. 22 page 19 of this brief), the same distinction is clearly repeated.

No. 37. *In re Nelson*, District Court Nebraska. (1941) 41 Fed. Sup. 221. It was argued that the stay in a farmer

debtor proceeding should start as of the filing of the amended petition under Section 75 (s).

The court held that the stay begins only with the entry of the stay order and that an appraisal, which can only be made after the amended petition is filed, is a prerequisite to the entry of the stay order.

No. 38. *Northern v. Holmes*, (1894), 155 U. S. 137.

At page 138 of the opinion it was said:

"It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

The opinion cited:

Aspen v. Billings, No. 4, page 3 of this brief;

Voorhees v. Noye, No. 60, page 45 of this brief.

No. 39. *Paradise v. Federal*, CCA 10 (1941), 118 Fed. (2d) 215. In a former debtor proceeding the entry of a stay order was inadvertently omitted. On August 7, 1940, the district court entered an order which is related in the opinion as follows:

"On August 7, 1940, the District Court found that the debtor was adjudged a bankrupt under section 75, sub. (s), on June 16, 1938; that the matter was referred to the conciliation commissioner; that an appraisal of the property of the bankrupt was duly made and filed; that the conciliation commissioner fixed the annual rental and awarded possession of the property to the debtor; that on September 8, 1938, the conciliation commissioner filed his report recommending a stay and that, through inadvertence, the formal stay order was not entered; and ordered that 'all judicial or offi-

cial proceedings in any court, or under the direction of any official, against the said bankrupt or any of its property, be and the same are hereby stayed for a period of three years from and after September 8, 1938, and this order shall be entered and take effect *nunc pro tunc* as of September 8, 1938.' "

On appeal the Appellate Court said:

"The stay provided for is not an automatic stay but a judicial one, to be granted only after a finding by the court that the conditions set forth in the section have been complied with."

"Since the stay order fixes the beginning of the three-year period during which the debtor must pay rent, and the beginning of the maximum period within which the debtor must pay the first year's rental, we are of the opinion that **the court was without power to give retroactive effect to its order of August 7, 1940, and start the running of the three-year period as of September 8, 1938,** and place the debtor in default for nonpayment of rent for 1938. We conclude that the three-year period must be held to have commenced on April 1, 1940; that the debtor's obligation to pay rental commenced on April 1, 1940; and that the debtor should be required to pay rental for 1940 and during the remainder of the three-year period in accordance with the order of the conciliation commissioner of April 23, 1940."

No. 40. *In the Matter of Pottasch; Central v. Irving*, (CCA 2) (1935), 79 Fed. (2d) 613: A referee's order in 1932 closed a bankruptcy estate and discharged the trustee. Thereafter, some assets deemed worthless were realized upon and the estate was reopened two years later. A creditor then asked the referee to amend an order made before the case was closed. The referee refused. No rehearing was allowed. The referee merely refused to amend his original order.

The following quotations from the opinion explain the situation and the holding of the Circuit Court of Appeals on appeal from the District Court:

"This order the referee signed on April 15, 1932, the accounts, etc., were assigned, the estate was thereafter closed and the trustee discharged.

Nobody had thought about the claims for the refund of customs duties, and the trustee's attorney did not even know of them, although they were mentioned in the claim as filed. Most of them were eventually dismissed, but in due course, some were allowed to the extent of about \$11,000. Thereupon the estate was reopened in the autumn of 1934, and the trustee was reappointed so that the recovery might be distributed."

"Thereupon, the petitioner asked the referee to amend the order so that it should conform to the petition, but the referee refused to do so, holding that he was without power to vacate or modify any of his orders."

"It is clear therefore that the order should be amended, unless the referee had no power to amend it; it did not embody the parties' intent." . . . "The only question therefore is whether the referee had power to amend it."

"We hold that a referee has the same power over his orders as the district judge has over his."

No. 41. *Potter v. Union Central* (1939), 308 U. S. 524; CCA 6 (1939) 102 Fed. (2d) 1010; CCA 6 (1940) 111 Fed. (2d) 145. The report of a special master recommended and the final order of the District Court dismissed a farmer debtor proceeding. The original final order of the Circuit Court of Appeals reads:

"It appearing to the court that appellant failed to file exceptions to the master's report within the period prescribed by Rule 13 of the Bankruptcy Rules of the District Court for the Northern District of Ohio; it is ordered that the motion of the appellees be sustained and the appeal dismissed." 102 Fed. (2) 1010.

The judgment of this Court on petition for certiorari reads:

"The petition for certiorari is granted. As the appeal from the order of the District Court filed December 4, 1937, was duly perfected, the Circuit Court of Appeals had jurisdiction and its order dismissing the appeal was error. The order is reversed and the cause remanded to the Circuit Court of Appeals for further proceedings." 308 U. S. 524.

Upon receipt of the mandate from this court the Circuit Court of Appeals after considering the stipulation of counsel overruled the motion by appellees to dismiss the former debtor proceeding and the decision of the special master and the decision of the District Court was reversed. 411 Fed. (2) 145.

No. 42. *In re Regozinno* (District Court New York 1941), 37 Fed. Supp. 524. Referring to the Third Circuit Decision in *Thumness v. Von Hoffman*, No. 53 page 40 of this brief, the opinion says:

"The more liberal view taken in *Thumness v. Von Hoffman* will be followed here. The provision in question was not intended to be treated as a statute of limitation."

No. 43. *Roemer v. Bernheim* (*Roemer v. Neumann*), (1899), 132 U. S. 403. Suit for patent infringement dismissed. Motion for rehearing which the court declined to entertain. A "formal petition for a rehearing" then

filed. The court granted rehearing "upon condition that plaintiff shall pay to the defendant all costs" to date.

On appeal to this court it was said in its very short opinion:

"The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case was heard or tried and is not a subject of appeal."

No. 44. *In re Rosser*, CCA 8 (1900), 111 Fed. 106. A referee in bankruptcy issued notice of a first creditors' meeting. The bankrupt received the notice. At that creditors' meeting the bankruptcy was examined. At the conclusion of the examination the referee issued an order upon the bankrupt to turn over \$2,500 to the trustee. The bankrupt, being committed to jail for failure to obey the order, objected that he had not been notified that such an order was to be a subject of consideration at the creditors' meeting. In its decision the Circuit Court of Appeals said:

"Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involved. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

No. 45. *Rubber Company v. Goodyear* (1868), 73 U. S. (6 Wall.) 153. Order entered in full form in minute book on November 28, 1866. Decree in same language entered on December 5, 1866, "as of November 28, 1866." Question was when the time for appeal began to run. This

court held that if the decree of December 5, 1866, had not been entered, the order of November 28, 1866, would have been the final order but that as the decree of December 5, 1866 was entered, it dated the running of time for appeal notwithstanding it was entered "as of November 21, 1866".

No. 46. *San Pedro v. United States* (1892) 146 U. S. 120. On appeal from a judgment in a suit to set aside a patent deed, this court said near the end of the opinion:

"A petition for rehearing is no more significant than a motion for a new trial, which, as well settled, presents no question for review in this court."

No. 47. *Sandusky v. National Bank*, (1875), 90 U. S. (23 Wall.) 289.

At page 156 of the L. Ed. (23 L. Ed. 155) this court said:

"A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

No. 48. *Sheets v. Livy*, (1938), CCA 4, 97 Fed. (2d) 674. In a farmer debtor proceeding in the "old days" when farmer debtor petitions were being dismissed for "lack of good faith" and this court had not yet stopped such dismissal by its decision in *John Hancock v. Bartels* (No. 29 page 23 of this brief) the District Court entered an order of dismissal without notice of hearing.

The Appellate Court said:

"There was abundant evidence, most of which was given by the debtor himself, from which lack of good faith in his proposal might readily have been inferred. Accordingly, the District Judge, acting with commendable promptness, filed an opinion nine days after receiving the commissioner's report in which he reached the conclusion that the proposal was merely a gesture which was made for the sole purpose of laying a foundation for the filing of a petition under subsection (s) of Section 75, and that in fact the debtor had made no fair and sincere offer to effect a payment of his debts through composition. He therefore found that the debtor had not made a *bona fide* effort to agree with creditors upon a composition or extension, and ordered that the amended petition be denied and the proceeding dismissed."

Yet the Appellate Court reversed the District Court, saying:

"The District Judge was nevertheless in error in denying the amended petition and dismissing the proceedings for two reasons. It was improper, no matter how strong the evidence of lack of good faith, to take this action without notice to the debtor and opportunity to be heard."

No. 49. *Slaughter House Cases* (1870), 77 U. S. (10 Wall.) 273. Judgment in state court. Time for writ of error ten days. Petition for rehearing thereafter in sixteen days.

Beginning at the top of the first column of the L. Ed. (19 L. Ed. 915) on page 920:

"Filed, as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas to stay execution, under the 23rd section of the Judicial Act,

Doubts were at one time entertained upon that subject, but since the decision of *Brockett v. Brockett*, [No. 40 page 19 of this brief], the question must be considered as settled in accordance with the views of the plaintiffs. *Rubber Co. v. Goodyear* [No. 45 page 35 of this brief.]”

“Undoubtedly, the writs of error in these cases were seasonably sued out and served. . . .”

No. 50. *In re Stearns and White*, CCA 7 (1924), 295 Fed. 833. Referee in bankruptcy allowed claim. Petition for review denied February 3, 1923. Later the court again denied the petition for review “in a little different language” on February 28, 1923. Appeal was allowed but not perfected. After time for appeal had expired “the bankrupt moved ‘to vacate orders of February 3rd and 28th enter new order *in re* claim of Lee, allow appeals and supersedeas, approve appeal bond and issue citation, etc.’” Motion granted by vacating orders, again denying petition for review and affirming the referee’s order.

On appeal it was moved to dismiss the appeal for that when the appeal was allowed the district court was without jurisdiction.

From page 838:

“We can hardly presume that the Supreme Court intended to suggest to Wilt (*Stickney v. Wilt*, 90 U. S. (23 Wall.) 150) that he might file a petition which would be ostensibly for the purpose of procuring a review, but which in fact be the thing condemned by Judge Lowell as unworthy, namely a proceeding to re-invest Wilt with the right of appeal.”

The appeal was dismissed.

No. 51. *Steins v. Franklin*, (1872), 81 U. S. (14 Wall.) 15. Suit in state court—no federal question involved.

Judgment affirmed by State Supreme Court. On petition for rehearing federal question was raised for the first time. Petition for rehearing denied. Upon error to this court it was said:

Page 848 of L. Ed. (20 L. Ed. 846, 848):

"Exceptions do not lie to the granting or refusing a new trial in a suit at law, nor will an appeal lie from the Circuit Court to this Court from an order of the Circuit Court in granting or refusing a petition for rehearing in an equity suit for the same reason, which is the motion in the one case, or the petition or motion in the other, is alike addressed to the discretion of the court, as shown in all the decisions of the federal courts."

No. 52. *Texas v. Murphy* (1884), 111 U. S. 488. Time for writ of error sixty days. Not shown when motion for rehearing filed. But it was heard and denied 126 days after the entry of the final order. However, in the cases cited and relied upon the applications for rehearing were filed after time. They were: *Brockett v. Brockett*, No. 10 page 9 of this brief; *Slaughter House Cases*, No. 49 page 37 of this brief; and *Memphis v. Brown*, No. 32 page 26 of this brief.

"The objection now made is, that as the judgment entered on the 21st of December was only an order overruling a motion for a rehearing, which is not reviewable here, we have no jurisdiction.

In *Brockett v. Brockett*, [No. 10 page 9 of this brief], it was decided that after a petition for rehearing, presented in due season and entertained by the court, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show, in express terms, when the motion for a rehearing was made, but it was entertained

by the court and decided on its merits. The presumption is, therefore, in the absence of anything to the contrary, that ² was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any other that might be made. This presumption has not been overcome.

The writ of error as issued is on its face for the review of the final judgment, not of the order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of opinion, therefore, that the judgment as entered on the 29th of May is properly before us for consideration."

No. 33. *Thummes v. Von Hoffman*, CCA 3 (1940), 109 Fed. (2d) 291.

From the opinion:

"The purpose of section 39, (sub. (c)), as expressed by the House Committee on Judiciary at the time the proposed amendment was submitted to Congress, was to establish definitely the practice (i.e., on petitions for review) in the interest of certainty and uniformity. This Congress accomplished by incorporating in the Bankruptcy Act, as section 39, sub. (c) what had been substantially the law in a number of districts under General Order 27 and local rules of court."

"... the right to review orders of a referee is elsewhere conferred upon the bankruptcy court by a different section of the Bankruptcy Act." (Section 2(10) of the Bankruptcy Act of 1938 is the same.)

"Thus the statute (sec. 2, cl. 10) confers the right to a review, and the amendment now under consideration (section 39, sub. (c)) defines the procedure and prescribes the time within which the proceeding for review shall be commenced, just as did General Order 27 and local rules of court before the adoption of the

amendment. No question as to the jurisdiction of the bankruptcy court to entertain a petition for review is involved by Section 39, sub. (c)."

No. 34. *United States v. Benz*, (1931), 282 U. S. 304. Indictment under federal statute. Plea of guilty and sentence. During term and while sentence being served upon petition of the defendant the District Court shortened the sentence. Appeal to the Circuit Court of Appeals which certified to this court the question whether the District Court during term had power to shorten sentence. This court answered "in the affirmative".

Page 306:

"The general rule is that judgments, decisions and orders are within the control of the court during the term at which they are made. They are then deemed to be 'in the breast of the court' making them and subject to be amended, modified, or vacated by that court."

No. 35. *United States v. East*, CCA 8 (1935), 80 Fed. (2d) 134. Claim disallowed by referee in bankruptcy. Petition for review denied by district court. After time for appeal petition for review filed reciting that certain documents were necessary to be introduced as part of the record in case of appeal. The rehearing was granted and the petition for review again denied.

At page 134:

"The petition for rehearing recited that there had been a hearing on the government's claim by the District Court on October 12, 1932, and that the District Court had on that day rendered a 'decision—denying government's petition for review of the findings of the referee denying the claim of the government,' but asserted on behalf of the government that the attorney for the government had at the time of the hearing 're-

requested leave to file certain documents as a part of the record in the case' and 'had understood that time would be granted to secure and present them' and that the attorney 'was wholly unprepared for the decision of the court' against the government. The rehearing was prayed for on the ground that the documents were 'necessary--as a part of the record in the event petitioner decides to take an appeal from the decision of the court.' "

Page 135:

"The matter coming on further to be heard by the trial court on June 4, 1935, the court found 'that on October 12, 1932, after a hearing, an order was entered, denying said petition for review and affirming the order of the referee; that on January 13, 1933, upon petition filed on that day, the court granted a rehearing for the purpose of enabling the United States of America to perfect an appeal to the Circuit Court of Appeals.'

It was thereupon ordered 'that the petition of the United States of America for a review of the referee's decision be . . . denied.' "

Page 135:

"From this record it is clear that the trustee in bankruptcy obtained a final judgment of the District Court disallowing the claim of the United States against the bankrupt estate on October 12, 1932, and that the right of the United States to appeal from the order was lost to the government by its failure to take an appeal within thirty days fixed by the statute. The proceedings by which it was attempted to extend time of appeal were ineffectual to that end."

No. 56. *United States v. Ellicott*; (1912) 233 U. S. 524.
Time for appeal 90 days. Motion for new trial in 84 days.
Overruled after term and appeal after 90 days. Motion to dismiss because appeal taken too late.

"The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the court of claims, and the rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. It is, we think, also manifest that the appeal was taken from the hypothesis just stated, that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of."

The opinion cites *Kingman v. Western*, No. 30, page 24 of this brief.

No. 57. *United States v. Mayer*, (1914), 235 U. S. 555. Conviction in district court for federal criminal offense. Sentences imposed. A writ of error issued out of the Circuit Court of Appeals which court admitted the accused to bail. Long after term the accused gave notice of application to District Court to set aside conviction, quash indictment or for new trial. On order to the judge of the District Court to show cause the Circuit Court of Appeals certified the questions to this court.

In answering the questions submitted by the Appellate Court this court said:

Page 67:

"In the absence of statute providing otherwise, the general principle obtains that a court can not set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun at that term."

The court expressly excepted proceedings in a court of equity.

No. 58. *United States v. Seminole*, (1937), 299 U. S. 417. Note: The decision in this case was announced three days before *Wayne v. Owens-Illinois*, No. 62 page 46 of this brief, was argued.

Certiorari to Court of Claims. Rule of Court of Claims required leave of court to file a second motion for new trial. Time for filing petition for certiorari three months after judgment.

Judgment December 2, 1935. Motion for new trial overruled on March 2, 1936. Five months and eleven days after judgment motion for leave to file second motion for new trial was filed on May 13, 1936, which was granted. Second motion for new trial filed five months and sixteen days after judgment on May 18, 1936. Six months and six days after judgment second motion for new trial was overruled. Seven months and six days after judgment a petition for certiorari was filed in this court.

Thus the motion for leave to file the second motion for a new trial and the second motion for new trial and the petition for new trial were all filed long after the three months period for filing a petition for certiorari.

It was argued that the second motion for new trial was filed under a statute (28 U.S.C. 282) which creates an exception to the general rule by not extending time for filing a petition for certiorari to this court.

This court found that the second motion for new trial was not filed under the statute but under the rule of the

Court of Claims and therefore the judgment did not become final until the motion for new trial was disposed of and the general rule of law was applicable.

Page 421:

"It is clear that the three months period, Section 350 [28 U.S.C. 350] did not commence to run until the court disposed of that motion and did not expire until long after the defendant had filed its petition for this writ. It is well settled that the time within which application may be made for review in this court does not commence to run until after disposition of motion for a new trial seasonably filed and entertained."

"This court has jurisdiction."

The opinion cites:

Brockett v. Brockett, No. 10 page 9 of this brief;

Texas v. Murphy, No. 52 page 39 of this brief;

U. S. v. Ellicott, No. 56 page 42 of this brief;

Citizens v. Opperman, No. 14 page 12 of this brief;

Morse v. United States, No. 35 page 29 of this brief;

Gypsy v. Escoc, No. 22 page 19 of this brief.

No. 59. *Voorhees v. Jackson* (1836) 35 U. S. (10 Pet.)

449.

At page 474 of its opinion this court said more than a century ago:

"If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law which can properly be deemed to have been done *coram non jure*; that is by persons assuming the judicial function in the case without lawful authority."

No. 60. *Voorhees v. Noye*, (1894), 151 U. S. 135. Application for rehearing within three days. Time for appeal not shown but it was more than three days.

From page 137:

"The appeal was allowed January 7, 1891, but the decree did not take final effect as of that date for the purposes of appeal nor until February 7, 1892, because the application for rehearing was entertained by the court, filed within the time granted for that purpose and not disposed of until then."

No. 61. *Washington v. Bradley*, (1869), 74 U. S. (7 Wall.) 575. Time for appeal ten days. Motion to rescind filed thereafter in twenty-eight days.

There is no doubt that during the term the decision was at all times subject to be rescinded and modified, upon motion, and could not therefore be regarded as absolutely final until the end of the term. It became final in this case when the motion to rescind had been heard and denied.

No. 62. *Wayne v. Owens-Illinois* (1937), 300 U. S. 131. (Note: Some of the history of the procedure in this matter has been assembled from *Wayne v. Owens-Illinois*, 83 Fed. (2d) 98; *Wayne v. Owens-Illinois*, 84 Fed. (2d) 965; and *Wayne v. Owens-Illinois*, 91 Fed. (2d) 827).

In a corporation debtor proceeding under Section 77B the district court dismissed the petition on March 2, 1936. Appeal dismissed by the Appellate Court on April 15, 1936, because taken under the wrong Section of the Bankruptcy Act (section 25(b) of the Act of 1898). Long after time for appeal had expired, the debtor went back into the District Court and on April 24, 1936, filed a petition for rehearing and to vacate the original order of dismissal of March 2, 1936. This was fifty-three days after the entry of the original order of March 2, 1936. Time for appeal was thirty days. The District Court vacated the original order and granted a rehearing. The debtor then refiled its 77B

petition which the District Court dismissed. On June 11, 1936, the debtor appealed a second time under a different section of the Bankruptcy Act (Section 25(a) of the Act of 1898). This was one hundred and one days after the entry of the original order of March 2, 1936, or seventy-one days beyond the time for appeal.

The Appellate Court dismissed this second appeal saying:

"We are of opinion that the court below was without power to grant a rehearing and set aside the order of March 2, 1936, after the expiration of the period allowed for appeal from that order. The order appealed from as well as the order setting aside the order of March 2 was therefore void; and as the effect of these orders was merely to extend the time for appealing from the order of March 2, we shall dismiss the appeal as though it had been taken from that order. Authority for this procedure is found in the cases cited. Appeal dismissed."

The "cases cited" were:

United States v. East, No. 55 page 41 of this brief;

Bonner v. Pottorf, No. 7 page 6 of this brief;

Matter of Stearns and White, No. 50 page 38 of this brief;

all being lower court opinions.

This court granted certiorari. The respondents moved to dismiss on the ground that the property had gone beyond the jurisdiction of the federal courts because a decree of foreclosure had become final before the jurisdiction of the federal court under Section 77B had been originally invoked and that subsequent to the original order of dismissal on March 2, 1936, and after the dismissal of the first appeal in the Appellate Court, a sale of the property had been confirmed, deed delivered and purchase money paid. The motion to dismiss was overruled.

The respondents further contended that the dismissal of the first appeal by the Appellate Court terminated the cause and since the thirty days for appeal had long since expired, the District Court was without power to entertain a petition for rehearing and therefore its second order of dismissal was void. Therefore, said the respondents, the second appeal was out of time and the Appellate Court properly dismissed it.

This court held:

1. A court of bankruptcy is a court of equity, but sits continuously and has no terms.

Citing:

Sandusky v. First, No. 47 page 36 of this brief.
decided by this court, and other lower court decisions.

2. A court of equity may grant a rehearing and vacate, alter or amend a decree after appeal, and after time for appeal if within term.

Citing:

Aspen v. Billings, No. 4 page 3 of this brief;
Voorhees v. Noye, No. 60 page 45 of this brief;
Zimmern v. United States, No. 67 page 53 of this brief.

3. The fact that a bankruptcy court has no terms and sits continuously renders ineffective as to it the rule that a court of equity may not vacate a decree after term.

4. A bankruptcy court has power to revise its judgments on seasonable application before rights have vested. Courts of law and equity have such power limited only by the term and not by the expiration of the time for appeal or by the fact that an appeal has been taken. There

is no reason for denying a similar right of a bankruptcy court to the time for appeal.

Citing:

United States v. Mayer, No. 57 page 43 of this brief;

United States v. Benz, No. 54 page 41 of this brief;

Aspen v. Billings, No. 4 page 3 of this brief;

Voorhees v. Noye, No. 60 page 45 of this brief;

Zimmern v. United States, No. 67 page 53 of this brief.

5. The granting of a rehearing is discretionary and refusal to entertain it or the refusal of the rehearing if entertained are not subject to appeal.

Citing:

Brockett v. Brockett, No. 10 page 9 of this brief;

Steines v. Franklin, No. 51 page 38 of this brief;

Hardin v. Boyd, No. 24 page 20 of this brief;

Boesch v. Graff, No. 6 page 5 of this brief;

San Pedro v. United States, No. 46 page 36 of this brief.

6. If the court refuse to entertain the application for rehearing and the time for appeal expires, the right of appeal is lost.

Citing:

Roemer v. Bernheim (*Romer v. Neuman*) No. 43 page 34 of this brief.

Morse v. United States, No. 35 page 29 of this brief.

Clarke v. Hot Springs, No. 14A page 12 of this brief.

7. Where a rehearing is granted, only for the purpose of extending the time for appeal, the time is not extended.

Citing:

Re Stearns, No. 50 page 38 of this brief;

United States v. East, No. 55 page 41 of this brief;

Bonner v. Potterf, No. 7 page 6 of this brief.

8. A bankruptcy court may grant a rehearing and rehear upon the merits and even though it reaffirm its action and refuse to change its original order the time for appeal runs from its entry.

Citing:

Aspen v. Billings, No. 4 page 3 of this brief;

Voorhees v. Noye, No. 60 page 45 of this brief;

Citizens v. Opperman, No. 14 page 12 of this brief;

Morse v. United States, No. 35 page 29 of this brief.

This court said in the opinion:

Page 132:

"The Circuit Court of Appeals has decided that a District Court is without power to set aside its order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act, 11 U.S.C. Section 207, and to rehear the cause after the expiration of the period allowed by the Act for appeal from the order; to resolve a conflict of decision we granted certiorari."

Citing as conflicting:

West v. McLaughlin, No. 64 page 52 of this brief;

Cameron v. National, No. 11 page 10 of this brief.

Saying: "This court has adverted to the question without deciding it. *Conboy v. First*". No. 16 page 13 of this brief.

Page 137:

"But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected."

"On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

Page 138:

"There was no abuse of sound discretion in granting the motion and reconsidering the cause."

No. 63. *Webster v. Barnes*, CCA 10 (1940), 113 Fed. (2d) 1003.

From the opinion:

"A proceeding in bankruptcy from the time of its commencement by the filing of the petition until the final settlement of the estate of the bankrupt is but one suit. A District Court, for the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. The rule that a court may not vacate at a subsequent term an order made at a prior term has no application to a proceeding in bankruptcy. Proceedings in a bankruptcy suit at any time prior to its termination are open for re-examination upon application

therefor in appropriate form; and any order made in the progress of the proceeding may be set aside and vacated upon proper showing made."

The opinion cites:

Sandusky v. National Bank, No. 47, at page 36 of this brief.

No. 64. *West v. McLaughlin*, (1908) CCA 6, 162 Fed. 124. A referee's order in bankruptcy was affirmed. There were ten days for appeal. Forty-nine days thereafter a petition for rehearing was filed. In a second opinion "more at length", the order was again affirmed. Motion to dismiss appeal because taken too late. The appeal was allowed.

No. 65. *Windsor v. McVeigh*, 93 U. S. 374.

The court said:

"That the decree a court of equity upon oral allegations without written pleadings would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way."

No. 66. *Wright v. Union Central*, (1940), 311 U. S. 273. At page 275 this court said:

"For example, it does not appear whether debtor asked for an appraisal under Section 75(s) which it is the duty of the court to make on such request and in which event the three year stay provided for in Section 75(s) (2) may start to run only after such appraisal has been made."

The opinion cited:

John Hancock v. Bartels, No. 29, at page 23 of this brief;

Borchard v. California, No. 8, page 6 of this brief.

No. 67. *Zimmern v. United States*, 1936, 298 U. S. 167. At the suit of the United States judgment was rendered to set aside deed and a decree issued to sell real estate subject to wife's homestead. During term the judge of the District Court entered an order extending the term for 90 days. "It appearing to the court . . . and for good reason shown, it will be necessary to modify or amend said decree." The judge then, within ninety days, amended the decision to reserve also the wife's inchoate right of dower. The Appellate Court dismissed appeals on the ground that the extended term did not toll the running of time for appeal.

On certiorari this court said:

Page 169:

"The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even to revoke it altogether. Finality of judgment was lacking until his choice was announced."

Respectfully submitted,

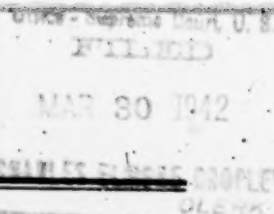
ELMER McCLAIN,

Counsel for Petitioner.

Lima, Ohio

February 12, 1942.

FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM 1941

NOS. 958-959 26-27

HENRY ANTON PFISTER,

Petitioner,

v.

NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HART-
MAN AND SON, E. C. HOOK, and EMIL
GEEST,

Respondents.

On Application for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER.

ELMER McCLAIN,
Lima, Ohio

Counsel for Petitioner.

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IN THE
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NORTHERN ILLINOIS FINANCE CORPORATION,
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GEEST,

Respondents.

On Application for Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER.

Preliminary Statement.

All emphasis in this reply brief is supplied unless otherwise noted.

The Order of This Reply Brief.

This reply brief will reply to the respondents' brief in the same order of that brief, using the paging of the respondents' brief as headings.

Respondents' Brief, Page 1.

Under Heading: "No Special or Important Reasons Exist for Granting Writ of Certiorari in this Case."

The respective assertions by the respondents are contradicted by the following references to the Petition and Brief:

Top of page 2, (not in conflict) and (no departure or sanction of departure from usual course of procedure):

Petition, pages 17 to 25, numbers 6 to 16.

Brief, pages 47 to 49, "Analysis of Cases Referred to by the Appellate Court." Also **Brief**, pages 58 to 69 and 72 to 73, where a total of 59 conflicting decisions are cited with references to discussions of them in the Supplemental Brief; the note at pages 25-26, this reply brief, cites a new one making 60.

Top of page 2 (no federal law not already decided):

Petition pages 14 to 17, paragraphs numbered 1 to 5.

Brief, page 58 ("Specification of Error 1"). **Brief**, page 66 ("Specification of Error 5"). **Brief**, page 67 ("Specification of Error 6", and "Specification of Error 7"). **Brief**, page 70 ("Specification of Error 9"); **Brief**, page 70 ("Specification of Error 11" and "Specification of Error 12"). **Brief**, page 76 ("Specification of Error 13", and "Specification of Error 14"). **Brief**, page 73 ("Specification of Error 15").

Reply to Respondents' Brief, Pages 5 to 6.

Under Heading: "Order of August 13, 1940 (CCA No. 7632)". (This is the order which fixed \$6375 rental and an additional \$6375 as extra payments making \$12,750 to be paid in 2 years, 8 months, and 13 days, and stayed proceedings for three years from April 26, 1940, being for 2 years, 8 months and 13 days. R. 72 to 77.)

1.

THE "FIRST OBJECTION".

Respondents' Brief, Page 6: "As to the first objection, the transcript in fact shows that a motion was filed by the debtor himself for the fixing of **such rental** and was set for hearing by his own motion on August 13, 1940 (R. 8). Furthermore at the hearing on August 13, 1940, the debtor through his counsel, joined the creditors in asking that the rental be fixed. (R. 113)."

This can mean nothing else except respondents mean to say that the farmer debtor made a motion shown at R. 8 to have a motion made by him to fix **such rental** set for hearing on August 13. It is not true.

It is not without significance that the respondents refer to R. 8 (which is the entry of July 25, 1940) for the entry of that date, and then abandon further reference to the record at R. 9 and 10 where the events of August 13 were embodied in the entry of that date. For the events of August 13 they take us not to R. 9 and 10 but to R. 113 which is the conciliation commissioner's opinion (entered September 30, 1940, two months later) entitled, "Referee's Opinion and Decision on Petition for Rehearing of Orders of September 7, 1940."

We will therefore first look at the record at R. 8 (cited by respondents) and then at R. 9 which show:

R. 8 July 25, 1940: "Motion by Debtor that appraisers be appointed, and his exemptions set off to him". . . . "Motion by debtor for hearing on exemptions and all other motions set for hearing August 13, 1940, at 10 o'clock a.m."

R. 9. August 13, 1940: "Motion by" . . . [**three of respondents**] . . . "that the rent of the farm and personal property be set at the sum of \$1625 for the first year; \$2125 for the second year and \$2625 for the third year" . . . [Total \$6375] . . . "In addition debtor is to pay \$1675 for the first year on the principal amount" . . . "\$2125 for the second year" . . . "and \$2625 the third year" . . . [Total \$6375. Grand total \$12,750.] . . . "**Hearing on motion; motion allowed** as per order (Dft). Objection by debtor, hearing thereon and objection overruled."

Instead of finding the farmer debtor moving that rental be fixed, he is recorded as objecting.

Turning now to R. 113 as cited by the respondents, we find the belated statement, made two months later on September 30, 1940, as to what occurred on August 13 and it contradicts the contemporaneous docket entry of August 13 as follows:

R. 113: "At the hearing of August 13, 1940, the debtor through his Attorney Coulson, joined the creditors in a motion asking that a **reasonable rental** for the real and personal property be fixed." R. 113, paragraph 6, first sentence.

We have nothing but this two months *ex post facto* statement that the **farmer debtor** actually sought an order

to compel him to pay \$12,750 in 2 years, 8 months and 13 days. We do have the contemporaneous entry of August 13, 1940, to show that it was the **respondents** who asked for exactly what was ordered.

Both the respondents and the conciliation commissioner silently elide over the order for **\$6375 extra payments** made on August 13 in response to the **motions made by respondents on that day without notice.**

As to the **rental** amounting to an equal sum of **\$6375 (total \$12,750)** imposed the same day, it can not be said that it was in response to the farmer debtor's motion (which it is said he made) for a "**reasonable rental**". Far from being a "reasonable rental," we would suggest that **\$6375 to be milked from 20 cows in 2 years, 8 months and 13 days is not "rental"**—it can only be characterized as an **impossibility**. When it is considered that a grand total of \$12,750 was ordered to be obtained out of the net returns of a 20 cow dairy farm in 2 years, 8 months and 13 days, it should be called an absurdity. When it is further considered that **twenty-five days later, on September 7, 1940, the cows, implements and feed were ordered sold as "perishable property"** words fail to characterize the proceeding.

We think such an order is a nullity—as void as an order upon the farmer debtor to pay the national debt.

THE "SECOND OBJECTION".

Respondents' Brief Page 6: "As to the second objection, the amount of the rental fixed by the order, the record in fact shows that the rental as fixed was an amount less than the maximum figure suggested as rent and principal payments by the debtor through his counsel, Robert E. Coulson. (R. 159-162)".

Again when we look at the record at R. 159 to 162, cited by respondents, we read from the referee's opinion and decision entered November 28, 1940, which was more than five months after the events of August 13, that:

"At the hearing on August 13, 1940, a hearing was held as to the fixing of the rental value for the property of said debtor and for the payment of principal due and owing by said debtor to the secured and unsecured creditors herein as their interests may appear, as provided by the provisions of 75-S of said Act; and at that time, after due hearing with reference thereto, counsel for said debtor, Robert E. Coulson, suggested then and there that the rental and principal payments be fixed between two designated amounts each year and that said rental, so fixed, was at a figure between the maximum and minimum so suggested by debtor's counsel. That said debtor was afforded and given full opportunity at such hearing to present evidence with reference to the rental value of said property; that at no time was he prevented from presenting such evidence; that said order of August 13, 1940, was duly presented to said Robert E. Coulson, attorney for said debtor; . . ." R. 159-160.

Now the original contemporaneous entries of the conciliation commissioner made in his docket on August 13, 1940, at R. 9, as indicated by the above quotations therefrom (Under reply to "The 'first objection'" page 4

of this reply brief), show that it was respondents who moved that rent of \$6375 and extra payments of \$6375, totaling \$12,750 be fixed, and they were so ordered then and there. There is no contemporaneous or first hand entry or document anywhere in the record to show that the farmer debtor or anyone for him suggested either such a ridiculous rental or extra payments totaling \$12,750.

Mr. Dazey's affidavit at R. 34 to 35 shows (1) that he (who had been retained as the farmer debtor's counsel) was incapacitated when these payments of \$12,750 were ordered, not only throughout the month of August but in fact from May 21 up to the time of the affidavit filed September 19, 1940—with a stroke of apoplexy with blood pressure as high as 232 and at that time 192. His affidavit also shows (2) that Mr. Coulson was at no time authorized to take any steps in the case except to file papers. R. 34 to 35.

Mr. Coulson's affidavit at R. 94 shows the same, stating that he was employed by Attorney Dazey merely to file papers and that he at no time intended to represent said farmer debtor in any manner involving the law and did not do so. R. 94 to 95.

In addition to his affidavit at R. 94 the record also shows that Mr. Coulson verified the "Petition for Emergency Restraining Order" at R. 27 to 35 which was filed in the District Court on September 17, 1940. This petition alleges: (1) that the \$6375 rental order and the extra payment order of \$6375, total \$12,750, was violative of Section 75 and void; (2) that it bears the written approval of three respondents and no other approval, "**was not presented to said farmer debtor or to his counsel, and was not approved by him or by his counsel**"; (3) that the farmer debtor at all times desired to present evidence on the subject of the order but had no opportunity to do so; (4) that

his evidence would show that said order was contrary to law; and (5) that he had on file his petition for rehearing.

In short the record is devoid of proof that the farmer debtor or his counsel suggested that he pay \$12,750 out of his 20 cow dairy farm in 2 years, 8 months and 13 days.

3.

THE "THIRD OBJECTION."

Respondents' Brief Page 6: "As to the third objection to this order, the record in fact shows that the debtor in his own petition stated:

'That your petitioner's moratorium began running on, to-wit: the 26th day of April, A. D. 1941, and said first year of said moratorium will expire on, to-wit: the 26th day of April, A. D. 1941' (R. 68).

The Referee followed this suggestion in fixing the stay period, and the error, if any, was therefore induced by the farmer debtor himself and his counsel. They are in no position to criticize the referee in following their own suggestion."

The quotation from the record at R. 68 is correct. It is part of the "Petition of Farmer Debtor to Fix Rental" at R. 65 to 68. The author of this peculiar document is not indicated. We do know the following facts:

1. It was filed August 10, 1940, and on that date, and long before and thereafter, Mr. Dazey, the farmer debtor's counsel was incapacitated from a stroke of apoplexy with blood pressure as high as 232 and in September still at 192. Affidavit of Mr. Dazey, R. 34 to 35.

2. Mr. Coulson, employed by Mr. Dazey as local counsel, did not undertake to represent the farmer debtor in any

way except to file papers and he did not represent him in any substantive manner. Affidavit of Mr. Coulson, R. 94 to 95.

Mr. Coulson also verified the "Petition for Emergency Restraining Order" filed September 17, 1940. R. 27, to 34, his verification noted at top of R. 34. It contains the following allegations:

R. 29, paragraph 3: The order of August 13, 1940, in starting the stay period from April 26, 1940 is contrary to Section 75(s)(2).

R. 29 to 30, paragraph 4: The order of August 13, 1940, in fixing \$6375 as rental to be paid within three years from April 26, 1940, that is within 2 years 8 months and 13 days from the date of the order, is contrary to Section 75(s)(2).

R. 30, paragraph 5: The order of August 13, 1940, fixed an additional sum of \$6375 (a total with rental of \$12,750) within the same period of 2 years 8 months and 13 days.

R. 30 to 31, paragraph 6: The order of August 13, 1940, bears the written approval of three of the respondents and no other. It was not presented to or approved by either the debtor or his counsel. The farmer debtor at all times during the pendency of the proceeding desired to present evidence on the subject of the order but had no opportunity to do so. The order is contrary to law in all respects.

3. An examination of the record discloses no reason why the stay and rental should date from April 26, 1940. No person with knowledge of the law and of the procedural facts would have picked that date. The record on this subject is here merely noted:

R. 2 and 3, Entries on district clerk's docket:

R. 3, April 25, 1940. Petition under Section 75(s) filed and approved.

R. 3, May 23, 1940. Notice and motion of Hook, (one of present respondents), filed. (As shown by later entries this was a motion to dismiss.)

R. 3, May 24, 1940. On call. No order—No order to vacate order of April 25.

R. 3, July 19, 1940. **Amendment to petition under 75(s) filed.**

R. 3, July 20, 1940. **Order of adjudication under Section 75(s) filed.**

R. 6 to 7, Entries on conciliation commissioner's docket:

R. 6, May 1, 1940. Memorandum of petition under Section 75(s) filed and approved.

R. 6, May 23, 1940. Debtor's inventory filed.

R. 6, May 31, 1940. Notice of first creditors' meeting.

R. 6, June 29, 1940. Written proposal by debtor to creditors' filed.

R. 7, June 29, 1940. First meeting of creditors. Farmer debtor sworn and examined. Motion by creditor (one of present respondents) to dismiss as to Section 75(a) to (r). Creditors reject proposal. Rule on farmer debtor to file "counter proposal". Motion by creditors for receiver.

R. 7, July 9, 1940. Second creditors' meeting. Motion to dismiss as to Section 75(a) to (r) allowed. "Debtor given fifteen days to file amended petition". Motion by creditors to appoint trustee.

R. 8, July 23, 1940. **"Amendment of petition under Section 75S filed by debtor." Order of adjudication under Section 75(s) and reference to conciliation commissioner.**

R. 8, July 25, 1940. Appraisers appointed.

R. 8, July 31, 1940. Appraisers' report filed.

R. 8, August 2, 1940. Conciliation Commissioner's report of exemptions.

R. 10, August 13, 1940. **Orders approving appraisal and fixing exemptions.**

Now Section 75(s)(2) clearly prescribes that the stay and rental order may not issue until after the appraisal

is made and exemptions set aside. These were done on August 13, 1940. R. 10, conciliation commissioner's entry of August 13, 1940. It "may start to run only after such appraisal has been made." *Wright v. Union Central*, 311 U. S. 273 at 275, citing *John Hancock v. Bartels*, 308 U. S. 180 (186), and *Borchard v. California*, 310 U. S. 311 (317).

And further, Section 75(q) lays upon the officiating conciliation commissioner a mandate to be active in protecting the statutory rights of the farmer debtor. It says:

"A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding in this section."

The referee was not warranted in following the "suggestion" in fixing the stay period. The duty of the conciliation commissioner is prescribed by the statute and no "suggestion" may amend that statute, especially when the farmer debtor's proceeding was not only rudderless but without a captain.

Respondents' Brief Pages 6 to 7.

- Under Heading: "Orders of September 7th (CCA No. 7631)". (These are the orders ordering sold as "perishable" the cows, implements and feed of the farmer debtor, R. 77 to '88.)

1.

Respondents' Brief Page 6: "The orders [they mean the three **motions** which were granted by the orders of September 7] of September 7th came on for hearing, pursuant to notice and order of court **on debtor's own motion, on August 13, 1940.**"

This statement is ambiguous. Whatever it means, the record does not support it. It may be intended to mean:

- (1) Either that the orders of September 7 (that is, the motions which were granted by the orders of September 7), came on for hearing on August 13,
- (2) Or that they came on for hearing pursuant to the farmer debtor's motion made on August 13,
- (3) Or that the farmer debtor made a motion which resulted in the orders of September 7.

The statement is false as to any of these meanings because:

1. The orders of September 7 (that is the motions granted by the orders of September 7) did not come on for hearing until September 7 when the motions of respondents were heard, and granted. They were not filed until August 7 to August 10 (R. 8 to R. 9) and on August 13 were set for hearing on August 30 continued to September 7. See R. 10, last sentence of entry of August 13 which continues over from R. 9. R. 10, entry of August 30.

2. The farmer debtor made no motion on August 13, nor at any other time, to have his chattels sold as "perishable". Respondents on July 25 were granted leave "to file petitions for reclamation and/or sale of personal property by August 10, 1940, under Sub. Sec. 8, paragraph 2". R. 8, last half of entry of July 25, 1940. Four such motions were filed on August 7, 8, and 10. Bottom of R. 8 and top of R. 9. Hearings were set for August 30. R. 10, end of entry of August 13 which continues over from R. 9. On August 30 they were continued to September 7. R. 10, entry of August 30. On September 7 they were heard and allowed. R. 10, entry of September 7. The only applications made by the farmer debtor prior to September 7 were: (1) His motion for appraisal and exemptions. R. 8, first entry of July 25. (2) His petition for a rental order. R. 9, second entry of August 10.

3. The orders of September 7 were issued upon the motions of respondents filed on August 7, 8 and 10, and upon no other, as shown under the immediately foregoing subparagraphs 1 and 2.

2.

Respondents brief bottom of page 6, continuing to top of page 7: "On this day [August 13] the Three Creditors offered witnesses to prove that the personal property in question was perishable within the meaning of the Act. After such witnesses were sworn, but before the evidence was given by them, debtor's counsel stated that such testimony was not necessary (R. 111). [In the record at R. 111 it is said that the date of this occurrence was "August 13, 1949".] Thereupon said witnesses were withdrawn and the following stipulation was made of record:

'Hearing on Reclamation Petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company, and Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph 2 sub-section (s) of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by the debtor as exempted property' (R. 10.)"

The hearing on August 13 was not called to hear the respondents' motions to reclaim their security. There was no occasion to present evidence in relation to these motions; they were not at issue and had not been set down for hearing. The first, that of respondent Hartman, was filed on August 7, and the last, that of respondent Northern Illinois, was filed on August 10. The hearing on August 13 had been set on July 25, thirteen days before the first motion

was filed and sixteen days before the last one was filed. The subjects of the August 13th hearing were the appraisal, exemptions, and rental. See R. 10, two entries of August 13. Pursuant to Section 75(s)(2), the conciliation commissioner proceeded to issue a stay order and fix rental. See R. 9, entry of August 13. And for the stay order see the last paragraph at R. 76.

In addition to the announced purpose of the called creditors' meeting on August 13, the creditors on that day brought up the subject of their pending petitions for the reclamation of their security (cows, farm implements, and crops) out of Section 75(s). The record contains the following entry from the conciliation commissioner's docket:

R. 10, top of page, August 13, 1940: "Hearing on Reclamation petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of paragraph No. 2, Sub-Sec. S. of Sec. 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by debtor as exempted property."

The scene in the conciliation commissioner's office on August 13th may be reconstructed with some confidence. Counsel for respondents were present. R. 9, entry of August 13. R. 16, affidavit of said counsel. Mr. Coulson was present. See bottom of R. 159. The farmer debtor was not present. He attended the creditors' meeting on June 29 (R. 7, top of page) and that on September 7 (R. 37, bottom half of page). R. 114 "Opinion and Decision"

¹The farmer debtor was not present. See the text of this reply brief which follows this quotation from R. 10.

of Conciliation Commissioner: "Of all the various meetings held in this cause, debtor attended only two."² The attorneys for the creditors ask Mr. Coulson whether the cows are not perishable and he says: "If they meant to ask him, whether the cows would die, he would answer yes." Mr. Coulson's affidavit on this point is:

"he at no time intended to represent said farmer debtor in any manner involving the substantive law and that in particular he did not stipulate or agree that any cows in the estate of said farmer debtor were perishable; that when present in the office of said conciliation Commissioner with attorneys for certain creditors, he was asked whether he would admit that the cows in said estate were perishable and he answered that if they meant to ask him whether the cows would die he would answer yes." R. 94 at 95.

The conciliation commissioner's version, some seven weeks afterward, of the alleged "stipulation" is as follows:

R. 111, Referee's Opinion entered September 30, 1940:

"At the hearing of September 7, 1940, the following persons were present: . . . [Names of counsel] . . .

Prior to that date, [that is on August 13], the Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son (hereinafter called the Three Creditors), offered witnesses to prove that cattle of the ages covered by their conditional sales contracts and chattel mortgages were perishable within the meaning of the Act. After the witnesses were sworn but before any evidence was given by them, debtor's counsel stated that such testimony was not necessary, that he would stipulate that the security of said Three Creditors were perishable within the

² The nonattendance of the farmer debtor at these meetings is further evidence of his proceeding floundering in stormy seas without captain or rudder, sans even a sea anchor.

meaning of the Act. This oral stipulation was entered on the Commissioner's docket under date of August 13, 1940."

To recapitulate. A called creditors' meeting was held on August 13 to settle the appraisal; set off exemptions, stay proceedings and fix rental. There were then pending four motions to reclaim the farmer debtor's chattels as "perishable", the last one having been filed three days previously. **These motions were not at issue; they had not been set down for hearing.** Mr. Coulson was asked by respondents' counsel: "Robert, don't you admit that cows are perishable?" He answers: "Well, if you mean will they die, I would answer yes." But the creditors and the conciliation commissioner aver that on this August 13th the creditors had their witnesses present and sworn but not used because Mr. Coulson said he would admit "the security of said Three Creditors was perishable within the meaning of the Act" (That is cows, implements, crops under Section 75(s)(2)).

If there be any immutable principle of Anglo-American jurisprudence it is that every man is entitled to have his day in court. The motions were not at issue on August 13; there was no notice that their subject matter would then be considered; the farmer debtor was not present; Mr. Coulson was not authorized; and there was no stipulation—merely banter between counsel. The time and place for proffered witnesses and testimony was at the time and place later set for hearing of the motions—namely before the conciliation commissioner on September 7, 1940. See the reference to Remington in petitioner's brief at pages 64 and 65. Also the decisions in the cases of *Rosser*, *Boyd v. Glucklich*, *Frank*, and *Galpin v. Page*, cited at page 65 of petitioner's Brief and discussed in his Supplemental Brief at No. 44, page 35; No. 9 at page 8; No. 19 at page 17 and No. 20 at page 18.

Respondents' Brief Page 8

Under Heading "Debtor's and Attorneys' Appearances before Referee."

1.

THE INCAPACITY OF COUNSEL.

During all of the times the proceeding was pending before the conciliation commissioner under Section 75(s) the farmer debtor's counsel, Mr. Dazey, was incapacitated. No other counsel was authorized to represent him. It was not until September 7 at the earliest that Mr. Dazey realized what was going on, and when he did he took measures to have the whole situation examined into. How respondents would think that an incapacitated man could protect his client's rights is not clear. At any rate they still claim the advantages they gained thereby. Under this unfortunate circumstance, evidently the respondents proceeded to "make hay while the sun shines". Upon a 20 cow dairy farm they got—upon their specific motions made and granted the same day without notice—a total of \$12,750 rental and extra payments, ostensibly by authority of Section 75(s)(2), to be paid within 2 years, 8 months and 13 days. Then after a 25 day breathing spell they obtained authority from the conciliation commissioner to sell, as "perishable" the farmer debtor's cows, farm implements and crops. As soon as Mr. Dazey learned of the floundering proceeding it was halted. Authority for the foregoing statements. R. 34 to 35. R. 94 to 95. R. 30, paragraphs 6, 8, 10, Note of verification by Mr. Coulson at R. 34. R. 9, entry of August 13. R. 72 to 76. R. 10, entry of September 7. R. 77 to 88. R. 146 to 147, paragraph 15.

Although the farmer debtor was without counsel, he should not have been without representation for 75(q) made it the sworn duty of the conciliation commissioner to protect the rights of the farmer debtor by assisting him. The conciliation commissioner seems to have administered the farmer debtor proceeding strictly as a referee in bankruptcy where the creditors control the proceeding and not under the farmer debtor statute which makes the conciliation commissioner the guardian of the rights of the farmer debtor under it.

Fortunately the creditors overreached their advantages and secured their orders without that due process of law which is necessary to make them valid.

2.

IMPUTING THE RESULTS OF COUNSEL'S INCAPACITY TO CLIENT.

Imputing the inactivity of his incapacitated counsel to the farmer debtor, the respondents say, at the middle of page 8 of their brief, that he "took no real interest in the proceedings, and his petitions for rehearing were not filed in good faith but 'merely for the purpose of reviving and extending the time for filing a petition for review.'"

It is difficult to conceive how respondents can seriously intend such a statement to be believed in the face of the record. We refer again to the evidence submitted in the brief for the petitioner under heading 3 at pages 49 to 56. It would seem to be quite apparent that he was seeking, and still seeks, the application of the "orderly procedure" prescribed by the "mandate of the statute" in Section 75 which the statute and the decisions of this court have re-

peatedly declared to be his right. Had he known, on September 17, 1940, when he filed his "Petition for Emergency Restraining Order" R. 27 to 34, that an order, or orders, of September 7 had already been entered, he would not, on the tenth day have prayed the District Court to restrain the conciliation commissioner from holding a sale before an order was entered.

3.

WHEN WERE THE ORDERS OF "SEPTEMBER" ENTERED?

Respondents' Brief, bottom of page 8: The respondents say: "Throughout petitioner's petition [brief], his counsel has taken the liberty of misrepresenting statements of fact which are not borne out by the record. For example, at pages 33, 35, and 53 of his brief, filed in this court, appear self-serving statements intended to give the impression that the orders of September 7th were not actually entered at such a time. **No references to the record bearing out these statements are made.**"

The challenge is accepted and we appeal to the record. We will trace these three orders of September 7, 1940 until they appear in their fully developed form at R. 77 to 88. We find them first in embryo.

1. R. 90, paragraph 3. Counsel for the petitioner here repeats the substance of the statement under the heading "Sixth" at page 53 of petitioner's brief and says that on September 12, 1940 (five days after the purported orders of September 7 were later said to have been entered) he

(1) went to the office of the conciliation commissioner, (2) asked for the conciliation commissioner's docket and file in this cause, (3) copied every entry in the cause, (4) examined and made notes of or copied every paper in the file, "taking each paper separately therefrom and carefully reading it," (5) but there was then in the file no order of September 7, 1940, for the sale of the petitioner's chattels, and (6) there was nothing on the docket pertaining to such an order except the entry of September 7 (which is copied in part in the next paragraph, and which appears in full at R. 10).

2. R. 32. At the top of R. 32 in the "Petition for Emergency Restraining Order" filed September 17, 1940, the conciliation commissioner's docket entry of September 7, 1940, relating to the allowance of the respondents' petitions to reclaim (now referred to as petitions to "sell") the chattels as "perishable" is copied in full. That entry concludes in these words: "prayer of petitions granted as per order (Dft)". Paragraph 8, R. 32 of the same "Petition for Emergency Restraining Order" recites that no order pursuant to the memorandum entry of September 7 had yet been issued or entered. Paragraph 9, R. 32, recites that the farmer debtor was informed and believed an order of sale was about to be issued. He had already filed a petition for rehearing of the order of August 13. (See R. 139). In paragraph 11 (R. 33), he averred that as soon as an order of sale was issued he desired to obtain a rehearing or to file a petition for review thereof. In paragraph 12 (R. 33) he averred that it was necessary to restrain a sale until an order should first have been entered.

Mr. Coulson verified the statements made in this "Petition for Emergency Restraining Order". R. 34, top of

page. Mr. U. G. Ward, an attorney, was present on September 7 at the hearing before the conciliation commissioner and says that an order was **to be prepared**. (R. 108.

3. R. 10, entry of September 7. As just remarked, the memorandum on the conciliation commissioner's docket dated September 7, 1940, concludes as follows: . . . "prayer of petitions granted as per order (Dft)". The interpretation of the parenthetical letters "(Dft)" is left to the reader. The respondents have not ventured to explain it. The original, and present, interpretation of counsel for the petitioner is that "(Dft)" is an abbreviation for "Draft" which in turn means "Let an order be drafted accordingly."

4. R. 35 to 40. At the hearing of the "Petition for Emergency Restraining Order" on September 19. (R. 3, last entry of September 19) respondents presented their "Answer" which is pregnant with important negative evidence.

In paragraph 8 (R. 38) of their answer they "aver that orders **have** been entered" on September 7. They do not clearly and unequivocally say "**were**" entered on September 7.

In paragraph 10 (R. 38 and 39) they say that "on the 13th day of **September** [August] AD 1940" they appeared with witnesses but Mr. Coulson waived proof and stipulated that the cattle were "perishable" under Section 75. They continue to say (which is important as will appear below): "Said commissioner so found **as will appear by his findings more fully set forth in his orders thereon, a copy of one of which is hereto attached and marked 'Ex-**

hibit B' ". Now this "Exhibit B" appears in full at R. 40 and it in no way recites any such "findings" by the conciliation commissioner. It merely appoints an officer and directs him to sell on September 30, 1940. But when we go to the full fledged order we find that, R. 79 and R. 87 to 88, he orders the sale to be at a "date and hour to be selected by said officer" with "at least five days' prior" notice; while at R. 81 the sale is to be on "fifteen (15) days' notice".

In paragraph 11 (R. 39) of their "Answer" they say that "said order is entered as of" September 7. And at R. 97 to 105, as late as September 26, we find the same respondents (bottom of R. 39, bottom of R. 105) referring five separate times to "the order" or "said order" (R. 100 and 101, paragraphs 3 and 4. R. 103, paragraph 11). They still shy away from a flat statement that three orders were entered on September 7 for we find them saying "said order prior to the time same was entered" and "at the time of the signing and entry thereof." R. 103, paragraph 11.

It appears significant that on September 19, before the District Court, and later on September 26, before the conciliation commissioner, the respondents would not categorically state that on September 7 three separate orders were entered and that they did not then and there produce the three orders but referred to a single order and produced something quite different—their "Exhibit B" appointing an officer to conduct a sale. The three orders when they appear in the record at R. 77 to 80; R. 80 to 82; and 82 to 88, were something else.

5. R. 88 to 97. All of the foregoing assumed additional significance when the farmer debtor's petition for rehear-

ing of the orders of September 7, filed September 20, is examined. In paragraph 4, R. 90, it is stated that on September 19 (at the hearing in the District Court, R. 3, last entry of September 19), the farmer debtor first learned what he had not theretofore known, namely that three orders were involved. But even then he did not see them and it was necessary to file on September 23 an amendment (R. 95) to his petition for rehearing in which at paragraph 10 he referred to paragraph 4 (R. 90) of the petition for rehearing and said that he did not see said "orders" until "one of them" was **shown to the court** and not until then did he know "**its contents.**" R. 96. As we know this must have been the interesting "Exhibit B" at R. 40, which turned out to be something different from the **THREE ORDERS** appearing in the record at R. 77 to 88.

6. Section 75(a) makes the conciliation commissioner a referee. Section 1(9) makes the referee the court. Rules of Civil Procedure, Rule 77, makes it the duty of the court immediately upon the entry of an order to serve notice and note the service on the docket. This was not done.

So right up to September 26 we find all parties referring to "an order" and that order was "**Exhibit B**" at R. 40.

It would seem pertinent to ask: Why were the three orders not produced on September 19 if they had been entered? Why was a different order produced as Exhibit B (R. 40) on September 19 if three other and different orders were entered on September 7? Why was the reference always to **an order** up to September 26. When the farmer debtor's pleadings repeatedly referred to an **order**

why did the respondents not say "There was not one but three orders and here they are and were entered on September 7"?

The conclusion of the whole matter is that it can not be said, as respondents assert at the bottom of page 8 of their brief that "the record emphatically shows that these orders were entered and signed by the referee on the date of their entry in the presence of the farmer debtor." The record leaves it very doubtful, to state it lightly, whether the three orders of September 7 were entered on that date.

REPLY TO THE "ARGUMENT" OF THE RESPONDENTS.

(Respondents' Brief, beginning at page 9)

Respondents' Brief. Pages 9 and 10: The assertion at the bottom of page 10 that the questions presented are not before this court. (See Petition, pages 10 to 25: "The Question Presented" and "Reasons Relied upon". Also Brief, pages 37 to 40: "Specification of Errors".)

All of the questions presented were comprehended in the Statement of Points submitted in the Designation in the appellate court (R. 188 to 191) in compliance with the rule of that court, and in that court's opinion (R. 209 to 215). They were fully argued in the appellant's brief, the appellees' brief and the appellant's reply brief in the appellate court. They were all considered in the opinion of the appellate court (R. 209 to 215). The petitioner's "Specifications of Errors" was compiled from the Statement of Points submitted below and from the opinion of that court.

Respondents' Brief Pages 11 to 14: The respondents here proceed to argue the merits of the decision of the appellate court.

It is conceived that this is not the time or place to argue whether the merits lie with the decision of the appellate court below. The reasons for the allowance of the writ have been respectfully submitted and the merits will be argued when the writ is granted. Therefore no reply is now offered to the respondents' arguments on the merits.

The petitioner's Petition for Certiorari, at pages 14 to 25, submits the reasons why a writ of certiorari should be granted. Among them are enumerated certain statutory provisions which have not been interpreted by this court. On certain of them the interpretation of the appellate court below is in conflict with that of other circuit court of appeals. Certain other questions of law are enumerated on which the decision below is in conflict with other circuits. On some of both points the decision of the appellate court below is contrary to one or more decisions of this court.

There is noted below a new decision of an additional circuit with which the decision below is in conflict, in the interpretation of Section 39(c).

NOTE

New Circuit Decision

On this subject the petitioner here respectfully brings to the attention of this court a newly announced decision

of another Circuit Court of Appeals, with which the decision of the appellate court below is in conflict. It is:

Biggs v. Mays, (CCA 8), decided February 16 1942, and digested at paragraph 33650 of the Bankruptcy Law Service, published by the Commerce Clearing House.

It holds that Section 39(c) of the Bankruptcy Act is not a condition upon the jurisdiction of the court and in no way limits the power of the court, being merely procedural.

This makes a total of four circuits with which the decision below is in conflict, namely the Second, Third, Sixth and Eighth. See Petition for Certiorari, pages 18 to 19, category 9.

CASES CITED BY RESPONDENTS

Respondents' Brief Pages 14 to 35.

The respondents make no mention of certain citations and authorities presented by the petitioner. It is therefore presumed that they are not questioned. We do not take seriously the suggestion that they are not germane or that the petitioner's brief does not correctly cite or apply them.

We will therefore proceed to discuss the cases noticed by the respondents.

Respondents' Brief Page 14.

Benitez v. Bank, 1941, 313 U. S. 270.

This decision is discussed in the petitioner's supplemental brief, at page 5, number 5. This court said in its opinion at page 272: "The meaning of the phrase 'for the purposes of **this section**' is hardly open to question". The words "this section" in the first paragraph of Section 75(s) applying to all objections, exceptions and appeals under Section 75 are qualified in no way. They occur twenty-six times in Section 75.

In re David, CCA 3, 1929, 33 Fed. (2d) 748.

This decision does not relate to the statutory provision of Section 39(c) of the Bankruptcy Act which did not then exist. It relates to a petition for a writ of certiorari which the appellate court denied. The Third Circuit is in accord with the general rule that a rule of court limiting time within which to file a petition for review is not jurisdictional. In fact its later decision in *Roberts Auto Supply v. Dattle*, CCA 3, 44 Fed. (2d) 159, discussed in the paragraph immediately following is sometimes cited as a leading case on the subject.

The Third Circuit is, in principle, another circuit with which the decision below conflicts—although its decisions so far reported have been on the former rule of court and not on Section 39(c) which incorporates the rule.

Respondents' Brief Page 15.

Miller v. Hatfield, CCA 6, 1940, 111 Fed. (2d) 28 at 34.

Several questions were involved in this decision. As will be seen by turning to the last two paragraphs of the

decision at page 34, **no petition for review was ever filed** on the question there discussed. And as will also be seen by reading the eighth and ninth whole paragraphs of the decision on page 32 (the second and third from the bottom of the page), this Sixth Circuit Decision expressly mentions Section 39(c) and says of the former rules of court (now embodied in the statute) that "the courts entertained petitions for review which had not been filed until after the expiration of the arbitrary period," **citing the Third Circuit decision of *Roberts Auto Supply v. Dattle*, CCA 3, 44 Fed. (2d) 159; (referred to in the preceding paragraph).** The opinion goes on, in the paragraph continuing over on page 33, to hold that even the conciliation commissioner was not bound by the ten days court rule and cites in support the Second Circuit decision of *In re Pottasch*, CCA 2, 1935, 79 Fed. (2d) 613. The *Pottasch* decision is included in the petition at page 24 and in petitioner's Supplemental Brief at page 32, No. 40. (A later decision of the Second Circuit, *In re Albert, Brooklyn v. Albert*, CCA 2, 1941, 122 Fed. (2d) 393, was cited at page 19 of the petition herein as being one of the decisions with which the decision below is in conflict.)

Both the Second and Sixth Circuits are named in the petition as being circuits with whose decisions the decision below is in conflict. See the petition at page 19 and at page 21.

Respondents' Brief Page 16.

Respondents on this page cite thirteen decisions, four of which they do not discuss. The other nine are not discussed in the order of appearance in this list. We will discuss all of them. The four which are not discussed by respondents will be discussed here. The other nine will be discussed in the order in which respondents discuss them.

DISCUSSION OF CASES CITED BUT NOT DISCUSSED BY RESPONDENTS.

Respondents' Brief Page 16: The Four Undiscussed Decisions Which Respondents Cite.

Mintz v. Lester, CCA 10, 1938, 95 Fed. (2d) 590, cited but not discussed, respondents' brief, page 16, case number 8. This decision accords with the universal rule that the denial of an application for rehearing is discretionary and not appealable. Appellant-Mintz appealed from an order "denying her motion for a rehearing". The motion for rehearing was denied May 20; the appeal was from that order and no other. The last sentence of the opinion is: "It follows that the appeal was improvidently granted and it is therefore dismissed. The distinction was clearly and concisely worded in *In re Jayrose*, CCA 2, 1937, 93 Fed. 471, quoted in supplemental brief, number 28 at pages 22 and 23, and cited in the petition at page 21 as one of the Circuit decisions with which the decision below is in conflict.

International v. Cary, CCA 6, 1917, 240 Fed. 101, cited but not discussed, respondents' brief, page 16, case number 9. This Sixth Circuit decision is sandwiched between its prior decision in *West v. McLaughlin*, CCA 6, 1908, 162 Fed. 124, 125, and its later decision in *Miller v. Hatfield*, CCA 6, 1940, 111 Fed. (2d) 28 at 32, both holding that a petition for review may be filed after the period fixed by rule of court. This decision was distinguished by the Sixth Circuit in *Miller v. Hatfield* at page 33, saying "This conclusion is not in conflict with *International Agr. Corp. v. Cary*, *supra*." This is true because the original order had already been considered on a petition for review and re-

versed. Two years later another petition for review was filed and dismissed.

In re Albert; Brooklyn v. Albert, CCA 2, 1941, 122 Fed. (2d) 393, cited but not discussed, respondents' brief, page 16, No. 11. This is one of the decisions cited as showing that the decision below is in conflict with that of other circuits. Petition page 19 "In the Second Circuit", it holds that Section 39 is not a statute of limitation, and does not limit Section 2 (10) and also that "The jurisdiction of the bankruptcy court when invoked by the filing of the petition continues until the estate is closed". It upholds the contention of the petition for certiorari.

In re Wister, CCA 3, 1916, 237 Fed. 793, cited but not discussed, respondents' brief, page 16, case number 13 (undiscussed by respondents). As already shown (at page 27 of this reply brief) the Third Circuit is in the majority in holding that a petition for rehearing may be filed after a rule-fixed time for filing. This Wister decision does not depart from its earlier and later decisions. The facts of the case set it apart. Creditor W filed a petition for review and eight months later joined with the trustee "praying that the proceedings be dismissed and the order of the referee be affirmed". Creditor S then filed an application to intervene, praying that W's petition for review be not dismissed and that he be allowed to intervene as if he had filed a petition for review. That is **S never filed any petition for review**. The application was denied.

This completes the cases cited at page 16 of respondents' brief and not discussed. They are in accord.

with the rules that (1) a district court has jurisdiction to hear a petition for review filed after the time limited therefor and (2) a petition for rehearing filed after time for appeal when entertained obliterates the finality of an order.

DISCUSSION OF CASES CITED AND DISCUSSED BY RESPONDENTS.

Respondents' Brief Page 16.

Conboy v. First National Bank, 1906, 203 U. S. 141. Case Number 1, cited at page 16 and discussed at pages 16 to 19 of respondents' brief. This case involved a question of substantive bankruptcy law.

The decision has been thoroughly analyzed in petitioner's Supplemental Brief, page 13, number 16. Four observations are pertinent to respondents' claims concerning it.

(1) Its internal structure is weak and lacks consistency. Five out of eight cases are inconsistent with the statement it makes concerning them. Reference is especially made to the portion of the decision quoted by respondents' Brief in the middle of page 13. See Supplemental Brief, lower half of page 13 and page 14, where this subject is analyzed.

(2) We are not concerned with an appeal from a denial of a petition for rehearing, but with an appeal from the original order.

(3) This court in *Wayne v. Owens-Illinois*, 1937 300 U. S. 131, 133, especially cited it in Note 2, as being indecisive and adhered to the two decisive decisions of (1) *West v. McLaughlin*, CCA 6, 1908, (discussed in the Sup-

plemental Brief at page 52, number 64, and (2) *Cameron v. National*, CCA 8, 1921, 272 Fed. 874 (discussed in the supplemental brief at pages 10, number 11.)

(4) The *Conboy* decision is 36 years old and this court has cited it only four times in cases heard by it and has never followed it.

The first time the *Conboy* decision was cited: *Harrison v. Magoon*, 1907, 205 U. S. 501. The *Conboy* case grew out of bankruptcy. This *Harrison* case involved (1) a judgment of a Hawaiian territorial court and (2) the applicability of an Act relating to appeals from that territory which was enacted after the original judgment was rendered. The opinion at page 503 remarked: "No doubt the decisions cited and others show that where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error or appeal does not begin to run until the petition for rehearing is disposed of." It was held that the territorial judgment act not being existent when the original judgment was rendered a petition for rehearing could not make such a subsequent act applicable. In passing the opinion observed that the general rule had been limited as to bankruptcy cases by the *Conboy* decision. This court expressly made it apply to bankruptcy law in *Wayne v. Owens-Illinois*, 300 U. S. 131. See Supplemental brief, page 46, case number 62.

The second time the *Conboy* decision was cited: *Old Nick v. U. S.*, 1910, 215 U. S. 541. Verdict and judgment in federal court for violation of alcohol tax, motion to vacate and for new trial overruled. Writ of error not issued within six months as required by statute, whereupon the court entered an order reciting that a writ of error was "issued and served *nunc pro tunc* as within" the statutory

six months. This court held that a mere *nunc pro tunc* order did not cure non-compliance. Again the opinion remarked, *obiter dicta*, that in bankruptcy a petition for rehearing filed after time for appeal did not save the appeal which was held otherwise in *Wayne v. Owens-Illinois*, as stated above.

The **third time** the *Conboy* decision was cited: *Zimmern v. U. S.*, 1936, 298 U. S. 167. Suit to set aside deed and to make real estate subject to income tax. The judgment court extended the term to allow time for modifying its judgment. This court held that the court had control over its judgment within the extended term and reversed the appellate court for dismissing the appeal. The opinion merely remarked, as an aside, that a petition for rehearing was filed "when the time for appeal had already gone by if the original decision was then presently in force. Cf. *Conboy v. First Nat. Bank*, 203 U. S. 141, 145."

The **fourth time** the *Conboy* decision was cited: *Wayne v. Owens-Illinois*, 300 U. S. 131, 133, note 2: "This court had averted to the question without deciding it," (citing the *Conboy* decision), and then proceeded to "decide it" adversely to *Conboy*.

It is of importance to note that in contrast to the *Conboy* decision of thirty-six years ago which has never been followed by this court in any case heard by it, the *Wayne v. Owens-Illinois* decision decided five years ago has been followed without question by the lower federal courts. The latest issue of Shepard's Citations contains 43 lower federal court references to it.

Respondents' Brief Page 19.

Chapman v. Federal, CCA 6, 1941, 117 Fed. (2d) 321. Case Number 3 in the list cited at page 16 and discussed at page 19 of respondents' brief.

It is evident that the author of respondents' brief has misread the facts in this case so they will be related. The farmer debtor died leaving as heirs her two sons and her surviving spouse, their father, who was appointed administrator. The constitutionality of the provision of Section 75(r) that the term "farmer" . . . "includes the personal representative of a deceased farmer" has not been determined by this court. Consequently two farmer debtor petitions were contemporaneously filed, one by the administrator, and another by the heirs, the administrator being himself the sole petitioner in one case and joining individually with his two sons in the other. Creditors attacked both petitions for "lack of good faith" and "impossibility of rehabilitation" and the District Court dismissed both cases.

As the constitutionality of the provision of Section 75(r) giving the administrator the right to file as a farmer debtor had not been attacked in the district court that subject was deemed waived and only the dismissal of the administrator's proceeding was appealed. After the appeal was briefed by the appellant this court decided *John Hancock v. Bartels*, 308 U. S. 180, holding that farmer debtor proceedings may not be dismissed for "lack of good faith" or "impossibility of rehabilitation" thus leaving the dismissal by the District Court without a leg to stand on. The appellee obtained an extension of time to plead and, abandoning every argument previously advanced, attacked the appeal upon the sole ground that a farmer debtor proceed-

ing by an administrator is unconstitutional and moved for dismissal of the appeal.

The appellant countered by obtaining leave to go back into the district court to file a petition for rehearing upon the basis of the *Bartels* decision. In the district court petitions for rehearing were then filed in both cases. Both were denied whereupon the heirs' case was also appealed making two pending appeals which were consolidated.

The appellate court held the administrator's proceeding was rightly brought under Section 75(r), thus leaving the heirs' case of no moment whatever except as an encumbrance on the docket. The opinion was that of a new judge just appointed. One judge died prior to the decision and did not participate in it. The third judge took occasion to "concur in the opinion". The opinion as to the heirs' proceeding relied upon *Mintz v. Lester*, CCA 10, 1938, 95 Fed. (2d) 590, (discussed at page 29 of this reply brief) where the appeal was from the dismissal of a petition for rehearing, and other similar weak appellate decisions. It quoted (at page 324) from *Conboy v. First National Bank* (1906), 203 U. S. 141, as follows. Page 324: "No appeal lies from orders denying petitions for rehearing". It held that the heirs' petition for rehearing was not "seasonably" filed (having been filed after seven months).

The petitions for rehearing in this pending *Pfister* case were filed within two weeks and five weeks respectively, both being filed shortly after counsel discovered what had occurred. R. 9, entry of August 13. R. 10 entries of September 7 and 16. R. 11 entry of September 20. R. 27 to 34. R. 34 to 35. R. 89 and 90, paragraphs 2 and 3. R. 144, paragraphs 7, 8 and 9. R. 146, bottom of page and top of R. 147.

The significance of *Chapman v. Federal*, CCA 6, 1941, 117 Fed. (2d) 321, is the following quotation from it: "But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the appeal runs from the date thereof" citing *Wayne v. Owens-Illinois*, 300 U. S. 131; *Voorhees v. John T. Noye*, 151 U. S. 131; *Gypsy v. Escoe*, 275 U. S. 498. Thus putting the Chapman heirs' decision solely on its interpretation of "reasonable" and "entertain" and "consideration on the merits". In this pending *Pfister* case the conciliation commissioner himself denied motions to dismiss the petitions for rehearing and therefore "entertained" them and reported that he fully considered the "entire proceeding". See petitioner's brief, page 36, "Petitions for Rehearing and Their Denial."

The Chapman opinion lends no aid to the respondents' argument. The facts and the procedure differ widely from the present pending case.

Respondents' Brief Page 19.

C. M. and St. P. R. Co. v. Leverentz, CCA 8, 1927, 19 Fed. (2d) 915. Case Number 2 as cited at page 16 and discussed at page 21 of Respondents' Brief.

Respondents' Brief Page 25.

McIntosh v. United States, CCA 4, 1934, 70 Fed. (2d) 507. Case Number 4 in the list cited at page 16 and discussed at page 25 of respondents' brief.

Respondents' Brief Page 26.

Northwestern v. Pfeifer, CCA 8, 1929, 36 Fed. (2d) 5. Case Number 6 in the list cited at page 16 and discussed at page 26 of respondents' brief.

Respondents' Brief Page 26.

Larkin v. Hinderliter, CCA 10, 1932, 60 Fed. (2d) 491. Case Number 7 as cited at page 16 and merely cited as "In accord" at page 26 of respondents' brief.

These four cases will be discussed in one group.

They were not bankruptcy cases but civil suits. In the first three cases time for filing error was three months. In each of these three cases a motion for new trial was filed within term but after three months and denied. Consequently each writ of error or appeal was taken more than three months thereafter.

The court in each of the three decisions held that if an application for a new trial or for rehearing is not filed within the period for seeking a review, it is lost. This was expressly disapproved and repudiated by this court in *Wayne v. Owens-Illinois*, 1936, 300 U. S. 131, at 137, saying "courts of law and equity have such power, limited by the expiration of the term at which the judgment or decision was entered and not by the period allowed for appeal, or by the fact that an appeal has been perfected," citing in Notes 9 and 8 some of the decisions of this court already relied upon by the petitioner. This decision, when rendered was with the minority, and is utterly repudiated.

The fourth case, *Larken v. Hinderliter*, CCA 10, -1932, 60 Fed. (2d) 491, was slightly different but sympathetic with the other three. Appeal time was thirty days and the court held that an informal application for a slight correction of a judgment was not an application for rehearing.

Respondents' Brief Page 25.

Clarke v. Hot Springs, CCA 10, 1935, 76 Fed. (2d) 918. Case Number 5 in the list cited at page 16 and discussed at page 25 of respondents' brief.

This is an obiter dicta opinion that a petition for rehearing to be seasonable must be filed "within the time for appeal". This court held in *Wayne v. Owens-Illinois*, 300 U. S. 131, 137 that the power of a court to entertain a petition for rehearing "is limited by the expiration of the term . . . and **not by the period allowed for appeal**". This court there further held that in bankruptcy there are no terms and therefore that right is not limited by the expiration of the term. The **appellate court** in the *Clarke v. Hot Springs* case **did not dismiss the appeals**—there were four of them which they decided on the merits.

Respondents' Brief Page 25.

McIntosh v. United States, CCA 4, 1934, 70 Fed. (2d) 507. Case Number 4 in the list cited at page 15 and discussed at page 25 of respondents' brief.

This case has been discussed at page 37 of this reply brief.

Respondents' Brief Page 26.

Northwestern v. Pfeifer, CCA 8, 1929, 36 Fed. (2d) 5. Case Number 6 in the list cited at page 16 and discussed at page 26 of respondents' brief.

This decision has been discussed at page 37 of this reply brief.

Respondents' Brief Page 26.

Larkin v. Hinderliter, CCA 10, 1932, 60 Fed. (2d) 491. Case Number 7 as cited at page 16 and merely cited as "In accord" at page 26 of respondents' brief.

This decision has been discussed at page 38 of this reply brief.

This ends the discussion of the thirteen cases cited on page 16 of respondents' brief.

Respondents' Brief Page 27.

Bowman v. Lopereno, 1940, 311 U. S. 262. Again it must be observed that the author of respondents' brief has misread the opinion he relies upon. It is sufficient to refer to the quotation from page 266 of the opinion which is quoted at page 8 of the supplemental brief, namely: "Treating . . . the petition of November 15, 1937, as a second petition for rehearing filed out of time" . . . "These circumstances enlarged the time for taking appeal" . . .

Respondents' Brief Page 28.

Gypsy v. Escoc, 1927, 275 U. S. 498. Again it must be suggested that the decision relied upon has been misread.

It is true that a petition for rehearing was filed within time (three months) for applying for certiorari and denied, within time, on June 14. But as the court said, "On September 30, 1927, **more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.**"

It is true that on June 18, still within time, an application for **leave to file** a second petition for rehearing was filed, and later, denied after time. But an application for **leave to file** an application for rehearing **is not the filing of a petition for rehearing** and does not have the effect of one. This court said that "the mere presentation of a motion **for leave to file**" does not have the effect of suspending the time for seeking a review.

This court went on to suggest to the petitioner how, within the applicable long established rule of law, another application for certiorari could be seasonably filed. It said that if **leave to file a second petition for rehearing** was granted and the **petition** was actually **entertained**, "then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition" for rehearing.

This court was but repeating the distinction it had already clearly explained in *Morse v. United States*, 1926, 270 U. S. 151, at page 153, as noted in petitioner's supplemental brief, page 29, at page 30, last paragraph, in the discussion of that opinion. The quotation on the point is at the top of page 30 of the supplemental brief.

Where a court actually entertains a petition for rehearing without expressly granting leave to file such leave is conclusively presumed. See *Aspen v. Billings*, 1893, 15 U. S. 31, quoted in this point in the discussion of the case in petitioner's supplemental brief, page 3, number 4, at the top of page 5. Counsel does not have access to the official paging of the decision but it is at 37 L. Ed., page 988, lower half of second column preceding paragraph numbered 3. See also *Kingman v. Western*, 1898, 170 U. S. 675 at page 678. The applicable quotation on this point is copied into the discussion of the case in petitioner's supplemental brief at number 29, page 23, in the middle of the larger quotation in the middle of page 24.

Reply to Respondents' Brief Top of Page 9.

Respondents say: That when a petition for rehearing filed after time for appeal is denied, the right of appeal is lost.

This statement is not supported by a single decision of this court except in the *Conboy* case decided thirty-six years ago—never followed, characterized by this court in *Wayne v. Owens-Illinois* as "indicisive" and there clearly repudiated and the decisive lower court contrary decisions upheld and extended. *Wayne v. Owens-Illinois*, 300 U. S. 131, 133, Note 2.

In the great number of decisions of this court which establish the simple rule that the denial of a petition for rehearing of an order which is entertained by the court destroys the finality of that order and starts the running of time to seek review, there is not one which holds that it is necessary that the court shall formally reopen the case,

set its order aside and enter a new judgment restoring it. The *Wayne v. Owens-Illinois* case did not so decide. It happened that such was the method of procedure in the District Court but **the issue was whether the filing of an application for rehearing after the time for appeal invoked the rule that its denial started the running of time for appeal.** This court held that it did.. It is sufficient, as has been often said by this court, if the court "**entertain**" the application for rehearing. Webster says that entertain means to receive and take under consideration, as to entertain a proposal.

There is very sound reason for sustaining the rule. If lower courts should be trammelled in their freedom to re-examine their orders, the burden upon reviewing courts would become intolerable and crowd out the proper consideration of carefully considered but erroneous decisions. The vast majority now freely act upon the rule. The bar has so understood it and it is embodied in the standard text books. See the quotation from Hughes "*Federal Practice*", Section 5698 and that from Mr. Mitchell, Chairman of the Committee which formulated the Rules of Federal Procedure, both quoted at page 62 of petitioner's Brief. The abandonment of this rule which has been commonly recognized from the inception of American jurisprudence would be the most calamitous decision ever pronounced by this court and would inevitably result in reviews of orders not exhaustively considered in the courts of their origin.

In the Pfister petitions for rehearing the conciliation commissioner not only (1) "entertained" them but (2) denied motions to dismiss them on the ground there was no jurisdiction to consider them (3) received voluminous pleadings and counter pleadings, (4) held hearings and

(5) "considered the whole proceeding." See the Brief page 36, "Petitions for Rehearing and Their Denial" and reference there cited.

Reply to Respondents' Brief Page 29.

That the orders of September 7 ordering sale of the farmer debtor's cows, implements and feed were "consent orders".

We do not believe that this suggestion is seriously relied on. We think it is lugged in as a desperate expedient. The answer runs through all that has already been said. But lest it might be considered that possible some of the decisions brought forward by the respondents would countenance such a conclusion in the instant case we briefly discuss them..

Curry v. Curry, CCA DC, 1935, 79 Fed. (2d) 172, page 30 of respondents' Brief. Divorce case. Wife through counsel entered into a separation agreement and obtained a decree. After paying the stipulated and awarded alimony for a long time the divorced husband, who had remarried, became financially embarrassed and could not pay, whereupon the wife brought suit to annul the divorce and the separation agreement in order to bring criminal action. The court held she had irrevocably ratified the separation agreement and the divorce. Mr. Pfister ratified nothing. His counsel did not even have any of the orders presented before entry.

Bergman v. Rhoades, 1929, 334 Ill. 143. In the settlement of an estate legatees by counsel agreed to take land instead

of money because it was found that a money settlement was impracticable. Their fully authorized counsel who had represented them for years participated in the agreement, the report and the application to the court. There was no disability and no lack of authority or knowledge.

Union Central v. Anderson, 1937, 291 Ill. 423. In mortgage foreclosure the mortgagee gave notice of appeal and then proposed settlement. It secretly instructed its counsel to abandon appeal and "watch for expiration of time". A written stipulation was drawn by counsel and the mortgagee kept it until one day after the mortgagor's time for appeal expired, and then refused to sign it, leaving the foreclosure naked. The mortgagor brought suit to cancel the mortgage alleging a trap by the mortgagee. The mortgagee was held to the stipulations made by its counsel, invoking "equitable estoppel". It said "Appellant makes reference in its brief to cases of authority and precedent, but none where the circumstances are such as exist in this case. The court can not permit its judgment, orders and decrees to thus be made the object of a designing litigant. . . . Precedent can not thus be permitted to embalm principle."

The pronouncement is commended to respondents.

Clemens v. Gregg (California), 1917, 167 Pac. 294, cited in respondents' brief at page 33. After acting upon a consent decree in the settlement of a foreclosure action by making payments for four years one party objected. It was held the consent decree had been fully ratified.

American v. Industrial, 1929, 235 Ill. 332, cited in respondents' brief at page 33. Industrial compensation case. Controversy by employer over name of widow, whether it

was Mrs. Hupka or Mrs. Kupka. Throughout the case she was "Mrs. Kupka" without objection by the employer who so referred to her in cross interrogatories. After judgment the employer urged that the identity of "Mrs. Kupka" was not established. The court held it was estopped.

Lyon v. The Perin, 1889, 125 U. S. 839, cited in respondents' brief at page 34. Patent suit, regularly set for trial, came on for hearing and was submitted on pleadings. The court found and decreed that "the equities are with the defendant; that the bill be dismissed." The plaintiff brought another suit in another jurisdiction involving the same parties and the same subject matter. It was held the first suit was *res judicata*.

Reply to Respondents' Argument at Page 35 that "Proper notice of all proceedings herein was given debtor under the rules of court."

There was no notice whatever of the order of August 13 to pay \$12,750 in 2 years, 8 months and 13 days. The motion of the respondents was made therefor and granted the same day. R. 9, entry of August 13, 1940. As to the "perishable" orders of "September 7", it is very seriously questioned whether they were actually entered on September 7. At any rate they were never presented to counsel. See pages 19 to 24 of this reply brief.

The suggestions of respondents are conclusively answered by *Borchard v. California*, 1940, 310 U. S. 311, where for four successive crop seasons the mortgagors and mort-

gagee agreed between them that payments should be made directly by the mortgagors to the mortgagee. They presented each agreement to the bankruptcy court which approved each one of them by a formal order. No review was ever sought. Upon such facts this court observed that:

Page 317: "Instead of prosecuting the cause before the conciliation commissioner pursuant to the debtor's petition, the bank resorted to a procedure not contemplated by the statute, evidently **on the theory that it could obtain some advantage by that course.**"

Page 318: "The petitioners were entitled to compliance with the procedure required by the statute."

Respondents fail to recognize the **purpose** of Section 75.

Respectfully submitted,

ELMER McLAIN,

*Counsel for Henry Anton Pfister,
Farmer Debtor, Petitioner.*

Lima, Ohio

March 24, 1942

FILE COPY

SEP 30 1942

CHARLES ELMORE PROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 26

HENRY ANTON PFISTER, *Petitioner,*

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN
STATE BANK, HARTMAN AND SON, et al.

No. 27

HENRY ANTON PFISTER, *Petitioner,*

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN
STATE BANK, HARTMAN AND SON, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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Lima, Ohio

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 26

HENRY ANTON PFISTER, *Petitioner*,

VS.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN
STATE BANK, HARTMAN AND SON, et al.

No. 27

HENRY ANTON PFISTER, *Petitioner*,

VS.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN
STATE BANK, HARTMAN AND SON, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

Copies of the applicable portions of Sections 2(10), 38 and 39a(8) and 39(c) and the whole of Section 75 of the Bankruptcy Act are inserted for reference in Appendix A following this brief.

The digest of cases referred to in this brief is collected in a "Supplemental Brief" which was filed with the Petition and Brief on the application for Writs of Certiorari.

I.

Index.

The index follows the front cover.

II.

THE REPORT OF THE OPINION BELOW.

The opinion of the Appellate Court below is reported as *Pfister v. Northern Illinois Finance Corporation*, CCA 7, 123 Fed. (2d) 523, decided November 10, 1941. R. 209 to 215.

The District Court below issued no opinion. The two final orders of the District Court are found at R. 173 to 178.

III.

Jurisdiction.

This court granted writs of certiorari on March 30, 1942. R. 236.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code; 28 USC 347(a).

The petitioner complied with Section 8(a) of the Act of February 13, 1935; 28 USC 350. The judgments of the ap-

pellate court below became final on December 6, 1941, when his petition for rehearing was denied. R. 220. The petition for certiorari was filed within three months thereafter.

IV.

A CONCISE STATEMENT OF THE CASE.

The Farmer Debtor and His Property.

The petitioner is a farmer debtor who owns, and with his family, resides upon and operates an 80 acre dairy farm in Illinois. His other property consists of approximately 20 cows, 1 bull, 3 horses, 20 hogs, and 130 chickens, together with the usual implements and other equipment necessary to operate such a dairy farm. R. 14, R. 20, R. 70 to 72.

The Farmer Debtor Law Invoked.

Becoming indebted beyond his ability to pay, he filed his farmer debtor petition for composition or extension of his debts under Section 75 of the Bankruptcy Act. Failing to obtain a settlement with his creditors, he amended his petition pursuant to Section 75(s) of that Act in order to obtain the three year statutory stay while paying rental, pending his eventual rehabilitation by redeeming his mortgaged property at its appraised valuation.

The Incapacity of Farmer Debtor's Counsel.

After the amended petition had been filed and before the first creditors' meeting under it, the farmer debtor's counsel, J. E. Dazey, Esq., became incapacitated as a result of a stroke of apoplexy and participated no further in the case except to prepare his affidavit which described his physical condition. R. 34.

Mr. Dazey resided in another federal court district of the State of Illinois and in compliance with a local court rule, he had designated a young local attorney, Robert E. Coulson, Esq., as co-counsel for the purpose of filing papers, and receiving service. Mr. Coulson was not retained by the farmer debtor and he was not authorized to represent the farmer debtor in any substantive capacity, nor did he attempt to do so. R. 30, par. 6. For statement verified by Robert E. Coulson, see R. 30, par. 6 and R. 34, top of page. For Mr. Dazey's affidavit see R. 34, bottom of page and top of R. 35. See also R. 89, par. 2. Mr. Coulson's affidavit is at R. 94 to 95. See also R. 146 par. 15. Denied by creditors: R. 36, par. 6. R. 97, par. 2. R. 154, par. 10.

Mr. Coulson has not participated in the proceeding since shortly after the orders complained of except to verify the petition of the farmer debtor to the Judge of the District Court for a restraining order which sought to stop a sale then believed to be imminent and to make his affidavit as part of the petition for rehearing of the purported orders of September 7, 1940. R. 27 to 35. (His verification is noted at R. 34, top of page.) His affidavit is at R. 94 to 95.

The First Creditors' Meeting.

Order of August 13, 1940, approving appraisal, staying proceedings, fixing rental and principal payments (noted at R. 9, entry of August 13, 1940 and R. 10, entries of August 13, 1940. The order is at R. 72 to 77.)

On August 13, 1940, was held the first creditors' meeting under the amended petition pursuant to Section 75(s). At that meeting the conciliation commissioner approved the appraisal and set off the farmer debtor's exemptions. R. 10, entries of August 13, 1940. R. 69 to 72.

On the same day, without any preliminary notice whatever, three of the respondents presented motions praying that rent be set at \$6,375 for three years and that additional payments on the principal of debts be ordered paid in the sum of \$6,375 making a total of \$12,750 to be paid within the three-year period. These motions are noted at R. 9, entry of August 13, 1940. These motions were granted on the same day by ordering the total of \$12,750 to be paid by the farmer debtor within 2 years, 8 months, and 18 days. Rental was to be paid semi-annually while the principal payments were to be made quarterly. R. 72 to 77. The estate from which, under the statute, this sum of \$12,750 was to be obtained out of its earnings, as well as whatever would be needed to achieve rehabilitation of the estate at its appraised value, was comprised of the real estate appraised at \$16,000 and unexempt chattels appraised at \$1,786.00. R. 70 to 72.

The order of August 13, 1940, also stayed proceedings for two years, eight months and 13 days from that date. That is, a so-called three-year statutory stay was made to run, not from the entry of the order as required by the statute, but from April 26, 1940. The last payment was ordered to be made by April 26, 1943. R. 9, entry of August 13, 1940. R. 72 to 77. Sec. 75(s)(2). *Wright v. Union Central*, 311 U. S. 273, 275, citing *John Hancock v. Bartels*, 308 U. S. 180 and *Borchard v. California*, 310 U. S. 311.

Adjourned Creditors' Meeting.

The Purported Orders of September 7, 1940, to sell cows, etc., as "perishable." (R. 10, end of paragraph continued from R. 9. R. 10, entry of September 7, 1940. R. 40, Exhibit "B". The orders are at R. 77, R. 80, and R. 82).

The creditors' meeting of August 13, 1940, was adjourned to September 7, 1940, when three additional orders are purported to have been issued. The uncertainty concerning the actual time of entry of these three orders is discussed at page 28 of this brief under heading "Sixth."

Creditors' petitions for reclamation of mortgaged chattels were pending before the conciliation commissioner. R. 8 to 9, entries of August 7, August 8, and August 10, 1940. Those which were granted appear at R. 42 to 48, R. 48 to 60, and R. 60 to 65.

The orders issued in compliance with the motions ordered sold as "perishable property" the farmer debtor's cows, bull, horses, sows, farm machinery and his 1939 crops. R. 77 to 88. This would have left him, after this shearing, with which to comply with the rental, principal payment and stay order of August 13, 1940, and to accomplish his rehabilitation, his farm and these chattels: household goods worth \$105; 4 heifers worth \$50; 15 pigs worth \$20; 130 hens worth \$50; and an automobile worth \$275 and which was mortgaged for its full value. R. 18. R. 71. Total \$510 of which only \$235 was free of mortgage.

The Effect of the Orders of August 13 and September 7, 1940.

These orders appear at R. 72, R. 77, R. 80 and R. 82.

A general recapitulation of his financial obligation to the court under the orders of August 13 and of September 7, 1940, shows that out of his 80 acre, 20 cow, dairy farm and \$510 worth of chattels he would, within 2 years, 8 months and 13 days, have to find, as a result of these two orders:

1.

The Payments to Be Made.

| | |
|--|-----------|
| August 28, 1940—Extra payment | \$ 406.25 |
| October 26, 1940—Rental \$812.50, Extra payment \$406.25 | 1,218.75 |
| January 26, 1941—Rental | 406.25 |
| April 26, 1941—Rental \$812.50, Extra payment \$406.25 | 1,218.75 |
| July 26, 1941—Extra payment | 531.25 |
| October 26, 1941—Rental \$1062.50. Extra pay- ment \$531.25 | 1,593.75 |
| January 26, 1942—Extra payment | 531.25 |
| April 26, 1942—Rental \$1062.50. Extra payment \$531.25 | 1,593.75 |
| July 26, 1942—Extra payment | 656.25 |
| October 26, 1942—Rental \$1312.50. Extra pay- ment \$656.25 | 1,968.75 |
| January 26, 1943—Extra payment | 656.25 |
| April 26, 1943—Rental \$1312.50. Extra payment \$656.25 | 1,968.75 |

Total necessary to meet the combined orders of
August 13 and September 2, 1940 within 2 years
8 months 13 days\$12,750.00

2.

The Final Redemption Payments.

By April 26, 1943, the farmer debtor would be confronted with the necessity of redeeming his farm and automobile pursuant to Section 75(s)(3) by paying their appraised value less payments on principal. The appraisal of the farm was \$16,000. R. 69 to 70. The automobile was appraised at \$275. R. 71.

There are other liens against the farm (R. 17 to 18), of more than \$6000. The rent payments would be applied

first to upkeep and taxes. Section 75(s)(2). Delinquent taxes alone were \$1028.32 on June 12, 1940. R. 6, entry of June 12, 1940. Current taxes are not stated. After upkeep and taxes were paid the balance of rent payments would be paid to creditors "as their interests may appear." The first mortgage bears 7 per cent. R. 16. After paying \$12,750 within 2 years, 8 months and 13 days, he probably would find himself with the same financial situation that confronted him in the beginning.

The result would inevitably be that he could not rehabilitate himself. Yet Section 75(s)(2), makes the power of the conciliation commissioner to order principal payments conditioned upon "the debtor's ability to pay, with a view to his financial rehabilitation." Section 75(s)(2).

Application for Emergency Restraining Order Against the Conciliation Commissioner (R. 27 to 34).

In September the farmer debtor heard from some source that his chattels were to be sold or advertised for sale upon order of the conciliation commissioner. He notified Mr. Dazey, his incapacitated counsel, who secured new counsel for the purpose of stopping the sale and securing redress from the stay, rental and extra payment order. The new counsel was unable to find any such order. R. 32, paragraphs 8 and 9: Verification by Robert Coulson, local attorney, noted at R. 34; top of page. R. 90, par. 3. The farmer debtor therefore on September 17, 1940, filed his petition for an order restraining the conciliation commissioner from selling his chattels. R. 27 to 34. It was denied by the judge of the District Court by his order entered September 19, 1940 (R. 41), alternative remedies being deemed adequate.

Petitions for Rehearing and Their Denial.

On September 16, 1940, the day preceding the filing of the application for a restraining order, the farmer debtor filed with the conciliation commissioner his petition for rehearing of the stay, rental and principal payment order of August 13, 1940. R. 139 to 147. The affidavits of Attorneys Dazey and Coulson therein referred to are at R. 34 to R. 94. To this petition for rehearing a motion by the creditors to dismiss for want of jurisdiction in the conciliation commissioner to hear it was overruled. R. 148. R. 149 to 150. The creditors then filed answers. R. 151 to 157. The conciliation commissioner, after a hearing, and after considering the whole proceeding denied the petition for rehearing on November 28, 1940. R. 158 to 164. R. 13, entry of November 28, 1940.

On September 20, 1940, he filed with the conciliation commissioner his petition for rehearing of the three "perishable property" sale orders of September 7, 1940. R. 88 to 96. An oral motion to dismiss this petition for rehearing for want of jurisdiction in the conciliation commissioner to hear them was denied although the record does not show it.¹

Answers were filed by the creditors. R. 97 to 108. The conciliation commissioner after a hearing and after fully considering the petition for rehearing and the whole proceeding denied it. R. 11, entries of September 20, September 23, September 26 and September 30, 1940. R. 109 to 116.

¹ This statement was also made in the Appellate Court below ("Appellant's Brief" at pages 13 to 14 and in the oral argument). It was repeated in the petition and brief for certiorari. It has never been denied.

Petitions for Review.

On October 9, 1940, a petition for review of the three orders of September 7, 1940, for the sale of the farmer debtor's chattels as "perishable property" was filed with the conciliation commissioner. R. 116 to 129. It was also duly certified by the conciliation commissioner to the District Court. R. 130 to 132.

On November 28, 1940, a petition for review of the order of August 13 relating to rental, principal payments and stay was filed with the conciliation commissioner. R. 165 to 172. It was duly certified by the conciliation commissioner to the District Court. R. 172 to 173.

Dismissal by the District Court of the Petitions for Review.

On December 16, 1940, the District Court dismissed both petitions for review upon the ground, in each instance, that there was no jurisdiction to hear them. R. 173 to 178.

Affirmance by the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the dismissals by the District Court. Opinion, R. 209 to 215. *Pfister v. Northern Illinois*, 123 Fed. (2d) 543. Final orders, R. 215 to 216. Petition for rehearing denied. R. 20.

V.

SPECIFICATION OF ERRORS.

1.

The Appellate Court erred in holding that the District Court did not have jurisdiction to hear a petition for review which was filed within the four-months period following approval of the appraisal, as fixed by Section 75(s).

2.

The Appellate Court erred in holding that the District Court had no jurisdiction to hear a petition for review which was filed within 10 days after the denial of a petition for rehearing of an order complained of, no right having intervened, and said petition for rehearing having been entertained and considered, and the entire proceeding having been considered by the conciliation commissioner.

3.

The Appellate Court erred in holding that the District Court had no jurisdiction to hear a petition for review of a void order of a conciliation commissioner unless such petition for review was filed within ten days of the entry of such void order.

4.

The Appellate Court erred in holding that the District Court had no jurisdiction, while a former debtor proceeding was still pending, to hear a petition for review of an order entered by a conciliation commissioner, regardless of when such petition for review was filed.

5.

The Appellate Court erred in holding that Section 39(c) of the Bankruptcy Act in naming ten days for the filing of a petition for review is a statutory limitation and not a rule of procedure.

6.

The Appellate Court erred in holding that Section 2(10) of the Bankruptcy Act is limited by Section 39(c) of that act.

7.

The Appellate Court erred in holding that Section 38 of the Bankruptcy Act is limited by Section 39(c) of that Act.

8.

The Appellate Court erred in holding, in a farmer debtor proceeding pending before a conciliation commissioner where a petition for rehearing of an order is filed, no right having intervened, and where also said petition for rehearing is entertained by the conciliation commissioner who overrules a motion to dismiss it for lack of jurisdiction to entertain it, and considers the whole proceeding and then denies the petition, that the time for seeking a review of said order does not run from the date of the denial of such petition for rehearing.

9.

The Appellate Court erred in holding that in a farmer debtor proceeding the period named in Section 39(c) of the Bankruptcy Act limits the time within which a petition for rehearing of an order may be filed with a conciliation commissioner, no right having intervened.

10.

The Appellate Court erred in holding that a conciliation commissioner in a farmer debtor proceeding may not entertain or consider a petition for rehearing of his order except when such petition is filed within ten days of the entry of the order, even though no right has intervened.

11.

The Appellate Court erred in sustaining the District Court in declining to hear and in dismissing, on the ground of lack of jurisdiction, a petition for review of the order of the conciliation commissioner which fixed the statutory stay and rental period in the farmer debtor proceeding to run from a date prior to the approval of the appraisal and prior to the order setting aside exemptions.

12.

The Appellate Court erred in sustaining the District Court in declining to hear, and in dismissing, on the ground of lack of jurisdiction, a petition for review of the statutory order of the conciliation commissioner which stayed proceedings and permitted possession to be retained by the farmer debtor upon payment of rental, and made the time of such stay and possession less than three years.

13.

The Appellate Court erred in sustaining the District Court in declining to hear, and in dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner which ordered sold as perishable property the farmer debtor's cows, bull, horses, sows, farm machinery and farm crops consisting of corn, soy beans, hay fodder, ensilage, oats, barley, rye and wheat.

The Appellate Court erred in sustaining the District Court in declining to hear, and in dismissing, upon the ground of lack of jurisdiction, a petition for review of an order by a conciliation commissioner ordering the farmer debtor to pay as rental and as payments on the principal of his debts, within 2 years, 8 months and 13 days, the total sum of \$12,750 where the appraisal of all the real estate is \$16,000 and the appraisal of all the unexempt chattels is \$1,786.

The Appellate Court erred in sustaining the District Court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner, when proceedings for obtaining such review had been perfected by the filing of a petition for review by a person aggrieved by such order and the serving of a copy of said petition upon the proper adverse parties, and when the conciliation commissioner had duly prepared and transmitted to the clerk his certificate on said petition for review, all in compliance with Section 39(c) of the Bankruptcy Act, such dismissal being based upon the sole reason that said petition for review was not filed within ten days after the original entry of the order complained of.

VI.

SUMMARY OF THE ARGUMENT.

The substantive acts of the conciliation commissioner would deprive the farmer debtor of his farm in violation of the express provisions of Section 75 designed to save it to him and are void. The procedures by which they would be accomplished are subversive of the purpose of the law. Due process of law was violated.

The opinion of the appellate court when compared with the statutes and decisions it rests upon is found to be inconsistent with them.

In holding that the express provisions of Section 75 are limited by other general provisions of the Bankruptcy Act the decision below, if followed, would destroy the farmer debtor law.

In holding that a petition for rehearing, if entertained and considered, does not expunge the finality of an order so that if denied the time for appeal from the order runs from the denial, the decision below runs counter to a principle of law as old as American Jurisprudence.

In holding that a district court has no jurisdiction or power to hear a petition for review, certified to it by a referee, if the petition for review was filed more than ten days after the original entry of an order, the appellate court runs counter to the uniform holdings of other circuits and sustains the district court in a holding inconsistent with that court's former ruling by the same judge in accord with the generally recognized rule.

The holding that orders in direct violation of the express statutory provision in Section 75 may not be corrected, while a farmer debtor proceeding is pending, is contrary to the long established holdings of this court and of the lower courts. Reference is here had to orders: (1) starting the stay period at a date preceding the entry of the order which declared it, (2) fixing a rental impossible to earn from the estate, (3) fixing impossible extra principal payments, and (4) ordering sold as "perishable property" the farmer debtor's dairy cows, bull, sows, horses, farm machinery and crops, all done ostensibly by authority of the statute itself.

VII.

ARGUMENT.

The General Nature of the Orders.

1.

Their Relation to Substantive Rights.

Had the substantive acts of the conciliation commissioner of the Bankruptcy Court below first been narrated in fictional form, they would probably have been considered too fantastic to conform to actuality. They were orders providing for:

1. A foreshortened stay period of 2 years, 8 months and 13 days, violative of Section 75(s)(2), and of the pronouncement of this court in *Wright v. Union Central*, 311 U. S. 273, 275, citing *John Hancock v. Bartels*, 308 U. S. 180, and *Borchard v. California*, 310 U. S. 311.

2. A rental of \$6,375 for the foreshortened stay period on an 80 acre, 20 cow dairy farm, violative of Section 75(s)(2) which requires that "the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property."

3. Extra payments of \$6,375 within the foreshortened stay period; levied, ostensibly, under power granted in Section 75(s)(2) which provides that "The Court . . . may, in addition to the rental, require payments on the principal due and owing by the debtor . . . in payments to be made quarterly, semi-annually or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation."

4. The sale of all the farmer's cows, bull, horses, sows, farm machinery, and crops, under the guise of "perishable property," leaving him his household goods, four heifers, 15 pigs, 130 hens and an automobile mortgaged to its full value.

2.

The Procedures Employed.

The various procedures whereby these actions were accomplished before the conciliation commissioner in the Bankruptcy Court below, while not so extravagantly fantastic, were nevertheless violative of the well recognized and long established principles of English and American Jurisprudence which are proudly heralded as part of the amenities of our legal system which distinguish it from others and are held up as examples of the progress of our civilization. They are all the more dangerous, and subversive to the accepted and usual course of judicial pro-

cedure, in that they were packaged in forms intended to carry out the intentions of the law of and established procedure. A perusal of the order of August 13, 1940, at R. 72 to 77, and of the three orders of September 7, 1940, at R. 77 to 88 discloses their design.

The Decision of the District Court Examined.

The final orders of the District Court below (found at R. 173 to 178) are **in conflict with its own decision in *In re Madonia*, (1940)**, District Court of Illinois, 32 Fed. Sup. 165, where it held that Section 39(c) does not limit the hearing of a petition for review. See Case No. 31, at page 25, the "Supplemental Brief" herein.

In the ***Madonia*** case it held that the court **had power** to hear a petition for review filed without leave after ten days saying the statute "should be liberally construed." In its orders of dismissal in these cases (R. 173 to 178) it held that it was "**without jurisdiction.**" See R. 175, top of page. R. 177, middle of page.

The Opinion of the Circuit Court of Appeals Examined.

We here examine the several points made in the opinion of the Appellate Court which is found at R. 209 to 215 and reported in 123 F. (2) 543.

1.

The point that Sec. 39(c) overrides Sec. 75(s).

The opinion reads: R. 210, last paragraph:

"Appellant first contends that Section 75(s) and not Section 39(c) governs appeals and reviews in farmer debtor cases."

The opinion reads: R. 211, bottom of page, R. 212, top of page:

"Our duty is to so construe both sections, if reasonably possible, that both may be effective. This can be done by construing the word "section" in the first paragraph of Section 75(s) to refer only to the part of that paragraph which precedes the proviso, and we thus construe it. The orders here complained of did not arise under this paragraph, but were entered in the course of hearings authorized under Section 75(s)(4). Hence we think Section 39(c) is controlling here."

The applicable portion of Section 39(c) reads as follows:

"c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing." . . .

The applicable portion of Section 75(s) in the first paragraph reads: "In proceedings under **this section**, either party may file objections, exceptions and take appeals within four months from the date that the referee approves the appraisal."

In *Benitez v. Bank*, 313 U. S. 270, discussed at No. 5 at page 5 of the "Supplemental Brief" herein, this court made it very clear that **Section 75 is supreme over all conflicting statutory provisions.**

2.

The point that a petition for rehearing, seasonably filed, entertained, and denied, stopped the running of the time for seeking review.

The opinion reads: R. 212, middle of page:

"Appellant further contends that if Section 39(c) is controlling, his petitions for review were filed in time. His argument in this respect is that his petitions for rehearing stopped the running of time for seeking review; that the finality of the orders of August 13, 1940, and September 7, 1940, was in each instance expunged by a petition for rehearing which he says was seasonably filed, entertained, and denied by the conciliation commissioner.

In support of this contention he relies upon *Bowman v. Lopereno*, 311 U. S. 262; *Wayne Gas Co. v. Owens-Illinois Co.*, 300 U. S. 131; *United States v. Seminole*, 299 U. S. 417, and analogous cases. The facts in these cases are to be distinguished from those of the case at bar in that the petitions for rehearing were granted, the old judgment was vacated, and a new judgment entered after a rehearing on the merits (as in *Wayne Co. v. Owens-Illinois Co.*, supra), or on the ground that the petitions for rehearing were filed within the time provided for appeal, and the order complained of had never become final until the disposal of the petition (as in *Bowman v. Lopereno*, supra). In the present case the petitions for rehearing were not filed within the time allowed for appeal, and each was denied."

With the utmost respect to the Circuit Court of Appeals below it is suggested that **not only the three decisions expressly mentioned by the Appellate Court but also those referred to as "analogous cases,"** all of which were cited by the petitioner as appellant below, **support the law as contended in his behalf there.**

Analysis of the Cases Referred to by the Appellate Court.

The following analysis of the cases cited and referred to by the appellate court is here presented. There were twelve of them including the three cases cited by the appellate court and the "analogous cases" which are also included in the court's remarks, but not cited by it. Of the twelve cases eleven are decisions of this Court and one is of a circuit court of appeals. They are listed below.

It is said in the appellate court's opinion that all these twelve cases are distinguished from this *Pfister* case in that in them the following statements applied which do not apply to this case: These statements, four in all, are first stated, and then measured against the twelve cases.

Statement 1. The petitions for rehearing was granted;

Statement 2. And the old judgment was vacated;

Statement 3. And a new judgment was entered;

Statement 4. Or the petitions for rehearing were filed within the time for appeal.

As to statements 1, 2, 3, or 4, they are correct or incorrect for each of the twelve cases cited, as follows. They are listed in chronological order.

The Three Cases and the "Analogous Cases."

| | Statement 1 is: | Statement 2 is: | Statement 3 is: | Statement 4 is: |
|---|--------------------|--------------------|--------------------|--------------------|
| Brockett v. Brockett, 1843 43 U. S. (2 How.) 283. Case No. 10, p. 9 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| Texas v. Murphy, 1844 111 U. S. 487. Case No. 52, p. 39 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Not stated |
| Aspen v. Billings, 1893 150 U. S. 31. Case No. 4, page 3 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| Kingman v. Western, 1898 170 U. S. 675. Case No. 30, page 24 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| United States v. Ellicott, 1912 223 U. S. 524. Case No. 56, p. 42 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| Citizens v. Opperman, 1919 249 U. S. 488. Case No. 14, p. 12 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Not stated |
| Morse v. United States, 1926 251 U. S. 151. Case No. 35, p. 29 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| Gypsy v. Escos, 1927 275 U. S. 498. Case No. 22, p. 19 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| United States v. Seminole, 1937 299 U. S. 417. Case No. 58, p. 44 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |
| Wayne v. Owens-Illinois, 1937 300 U. S. 131. Case No. 62, p. 46 of the "Supplemental Brief" herein | Correct | Correct | Correct | Incorrect |
| Carpenter v. Conder, CCA 9, 1939 108 Fed. (2d) 318. Case No. 12, p. 11 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Correct |
| Bowman v. Lopereno, 1940 311 F. S. 262. Case No. 8A, p. 7 of the "Supplemental Brief" herein | Incorrect | Incorrect | Incorrect | Incorrect |

¹ But see abstract of the case at No. 52, page 39 of the "Supplemental Brief" herein.

² But see abstract of the case at No. 14, page 12 of the "Supplemental Brief" herein.

Thus the analysis of all the twelve cases demonstrates that the statements in the opinion of the appellate court are correct or incorrect as a whole as follows:

| | Correct | Incorrect | Not Shown | Total |
|--|------------|--------------|-----------|-------|
| 1. Petition for rehearing granted | once | Eleven times | | 12 |
| 2. Old judgment vacated | once | Eleven times | | 12 |
| 3. New judgment entered | once | Eleven times | | 12 |
| 4. Petition for rehearing in time for appeal | five times | five times | twice* | 12 |
| | | | Total | 48 |

Recapitulation:

| | |
|-----------|----------|
| Correct | 8 times |
| Incorrect | 38 times |
| Not Shown | 2 times |

Total 48 times

These cases, whether considered separately or as a whole, establish the long observed rule that the finality of an order for the purpose of appeal, is expunged by an application for rehearing which is seasonably filed, entertained, considered, and denied, the order becoming final for the purpose of appeal upon the denial of the application for rehearing.

3.

The statement that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review.

The opinion of the Appellate Court reads: R. 213, middle of page:

"Another distinguishing feature is that it is quite apparent from the record here that appellant's petition for rehearing was filed merely for the purpose of reviving and extending the time for filing a petition for

* But see Notes 2 and 3. These "Not stated" instances really belong to the "Incorrect" column making the score: Correct 8 times, Incorrect 40 times.

review, under which state of facts the court in the *Wayne* case said an appeal should be dismissed."

Again the appellant must respectfully differ from the appellate court's interpretation of the record. The record speaks again and again of the earnest and urgent insistence that the wrongs done be rectified by the conciliation commissioner where they were committed. "Let us look at the record."

First

R. 34: The actions of the conciliation commissioner occurred while the petitioner's counsel, J. E. Dazey, Esq., was incapacitated from apoplexy. Affidavit of J. E. Dazey, R. 34.

Second

R. 94: The local counsel (Mr. Coulson) engaged by Mr. Dazey (not by the petitioner) was not authorized to represent the petitioner substantively but merely to file and receive papers, and he never intended to act in any other capacity. He did not stipulate or agree that cows are perishable. Affidavit of R. E. Coulson. R. 94 to 95.

Third

R. 27. As soon as he heard that he was about to be sold out the farmer debtor, by new counsel, presented to the judge of the district court on September 17, 1940 (R. 3, entry of September 17, 1940) his "Petition for Emergency Restraining Order". R. 27 to 35. He recapitulated the proceedings in his case stating that the order of August 13, 1940, comprising the foreshortened stay period of 2 years, 8 months and 13 days, the excessive rent of \$6,375 and the extra payments of \$6,375 was void, that he desired to present evidence and the law, that he had not had such

opportunity, that he had not admitted or stipulated that any of his property was perishable and that he had already filed with the conciliation commissioner a petition for rehearing of the order of August 13, 1940 (the order "Fixing Rental and Additional Payments." R. 72). R. 27 to 32, paragraphs 1 to 7 and paragraph 10.

He further averred that no order for the sale of his cattle and other chattels had been entered by the conciliation commissioner, and that he had been informed that at the end of ten days from September 7, 1940, (that is, on the day he filed his application for an Emergency Restraining Order, see R. 27), the conciliation commissioner proposed to issue an order of sale. R. 32, paragraphs 8 and 9.

He further stated that upon the issuance of an order pursuant to the memorandum of September 7, 1940 (relating to the sale of his cows as "perishable", see R. 10, Conciliation Commissioner's entry of September 7, 1940)⁵ he desired to file a petition for review thereof, or a rehearing as necessity should require. R. 33, paragraph 11.

This petition was verified by the petitioner, Henry Anton Pfister, by Robert E. Coulson, the local attorney, and by his new counsel, Elmer McClain. R. 33, bottom of page to R. 34, top of page. There was also presented to the district judge the affidavit of J. E. Dazey, Esq., in its support. R. 34. See also affidavit of Robert E. Coulson, Esq. R. 94.

Three of the respondents answered admitting part and denying part. R. 35 to 40.

⁵ The running heads at R. 6 to 13 should be "Entries on Conciliation Commissioner's Docket," not "Entries on Clerk's Bankruptcy Docket."

Fourth

R. 41: This "Petition for Emergency Restraining Order", R. 27 to 35 was denied by the district court on September 19, 1940. R. 41.

Fifth

R. 139 to 147. As stated to the judge of the district court on September 17, 1940 (R. 31, paragraph 6 at the end on p. 32) the petitioner had already filed with the conciliation commissioner his petition for rehearing of the order of August 13, 1940 (that is, the "Order Fixing Rental and Additional Payments"). This petition for rehearing appears at R. 139 to 145. On September 23 he filed an amendment thereto. R. 145 to 147.

In this petition for rehearing he referred to the foreshortened stay period of three years from April 26, 1940, ordered August 13, 1940 (R. 140, paragraph 2); the rental payments of \$6,375 to be paid within the foreshortened period (R. 140, paragraph 3); the principal payments of \$6,375, making a total of \$12,750 to be paid within such foreshortened period (R. 140, paragraph 4), stating verbatim the entries appearing on the conciliation commissioner's docket (R. 140 to 142, paragraph 5). He referred to the orders of appraisal and exemptions and the impossibility of meeting the payments ordered to be made therefrom (R. 142 to 144, paragraph 6). He stated that said order while bearing the approval of three secured creditors bore no other approval and that it was not presented to him or to his counsel and was not approved by him or by his counsel, that he had entered no objection and no hearing had been had on any objection. (R. 144 paragraphs 8 to 10).

He further stated that he had desired at all times during the pendency of his proceeding to present evidence on the subject of the order but had no opportunity to do so and that the evidence to be presented would demonstrate that the rental was contrary to law, and that said stay and possession period was unlawful. R. 144 to 145, paragraphs 11 to 14.

On September 23, 1940, his amendment to his petition for rehearing further stated that J. E. Dazey, Esq., had been engaged by him as his counsel and that Attorney Dazey engaged Robert E. Coulson, Esq., to file and receive papers and to do nothing else, and that up to September 7, 1940, Attorney Dazey had not known of any stipulation or agreements; and that Attorney Dazey had become incapacitated in May, 1940 from a stroke of apoplexy; that as soon as Attorney Dazey had learned, on about September 7, 1940, of the entry of the order of August 13, 1940, he, Attorney Dazey, had engaged new counsel to investigate the dockets and files and protect the rights of the farmer debtor. R. 146-147, paragraph 15.

The petition for rehearing and its amendment were verified by the petitioner. R. 147. The affidavit of Attorney Dazey at R. 34 was incorporated. The affidavit of Attorney Coulson at R. 94 was also incorporated.

Three of the respondents moved the conciliation commissioner to strike the petition for rehearing for lack of jurisdiction to consider it. R. 148. The conciliation commissioner overruled it. R. 149. Certain creditors filed answers to the petition for rehearing admitting part and denying part. R. 151 to 157.

Sixth

R. 88 to 96. On September 20, 1940, the petitioner filed with the conciliation commissioner his petition for rehearing of the three orders of September 7, 1940 (that is, the orders to sell cows, implements, etc. as "perishable." See R. 77 to 80. R. 80 to 82. R. 82 to 88. This petition for rehearing is at R. 88 to 96. He repeated the incapacity of his counsel, J. E. Dazey, Esq., from apoplexy and the limited authority of Robert E. Coulson, Esq., engaged by Attorney Dazey and not by petitioner, as local counsel to receive and file papers; that Attorney Dazey had engaged new counsel to investigate the proceedings as soon as he learned of them (R. 89, paragraph 2), **that on September 12, 1940, said new counsel went to the office of said conciliation commissioner, asked for the conciliation commissioner's docket and file in said cause and copied every entry pertaining thereto and examined and made notes of or copied every paper in said file, taking each paper separately therefrom, and carefully reading it, and there was then on said docket no memorandum relating to the sale of petitioner's property except the docket entries copied therefrom in paragraph 6 of the petition for rehearing and that there was then in said file no entry of September 7, 1940, ordering the sale of petitioner's chattels, namely cows** (R. 90, paragraph 3 and R. 92, paragraph 6 at R. 93, entry of "September 7, 1940"); that a week later on September 19, 1940, petitioner learned the three orders had been entered for the sale of his chattels (R. 90, paragraph 4). He set out the appraisal, the exemptions, and a list of chattels to be left to him by the sale of certain of his chattels and showed that the real estate and chattels left were not sufficient to enable him to operate his farm (R. 91 to 92, paragraph 5).

He further averred that neither he nor his counsel had admitted, consented or stipulated; as stated in the said

docket, that any of his chattels were perishable. R. 93, paragraph 7. He said he had desired and still desired to present the evidence and the law relating to the subject of said orders of September 7, 1940, and that he had not had opportunity to do so. R. 94, paragraph 8.

The affidavits of J. E. Dazey, Esq., and of Robert E. Coulson, Esq., were a part of this petition for rehearing. R. 94, paragraph 9 and see the paragraph following the prayer.

By an amendment to this petition for rehearing filed August 23, 1940, (R. 95, middle paragraph) the petitioner further stated that in reference to paragraph 4 concerning the "three orders" of September 7, 1940, he did not see them "until one of them was shown by" said conciliation commissioner to the district judge on September 19, 1940, and that until then he did not see or know its contents. R. 95, paragraph 10.

Seventh

In most of the cases where it has been held that a petition for rehearing filed "merely" to gain time for appeal will not accomplish its purpose, the facts have been that the lower court, for the accommodation of an appellant who had let the time for appeal go by, granted a rehearing for the purpose of reviving the time for appeal and without giving any consideration to the merits involved. The history of the petitions for rehearing in this instance is quite different. That history is now related:

Explicit petitions for rehearing and amendments were filed showing the strong reasons why rectification should be made in the orders. R. 88 to 97. R. 139 to 148.

Motions to dismiss the petitions for rehearing on the ground that the conciliation commissioner had no jurisdic-

tion to hear them were filed by the creditors and overruled by the conciliation commissioner. R. 148 to 150 relating to the petition to rehear the order of August 13, 1940 which fixed rental and extra payments. A similar oral motion was made and orally overruled as to the petition to rehear the orders of September 7, 1940, relating to the sale of cows etc., as "perishable but the record does not show it. See Note 1 at page 9 of this brief.

Answers were filed to both petitions for rehearing. Answer: R. 97 to 107. Reply: R. 107 to 108. Answer: R. 151 to 157. Re Amendment to Answer: R. 160, last part of paragraph ending "after leave of court given". R. 11, entry of September 26, 1940.

Hearings were had. R. 11, entry of September 26, 1940. R. 13, entry November 28, 1940. The "entire proceeding" was "considered." See R. 13, entry of November 28, 1940. "Referee's opinion and decision on Petition for Rehearing and amendment thereto of the Order of August 13, 1940", R. 158 to 164, and the "Referee's opinion and decision on Petition for Rehearing of Orders of September 7, 1940". R. 109 to 116. **These all show that the two petitions for rehearing were entertained and thoroughly considered by the court on their merits.**

It would seem to be demonstrated by the record that the petitions for rehearing were presented for relief and not merely to gain opportunity for appeal. What the farmer debtor wanted was the benefit of Section 75 and not litigation. It is impossible to read the pleadings, affidavits, and decisions and not conclude that the petitioner sought relief, not appeal.

4.

The point that the three orders of September 7 (to sell cows, etc., as "perishable") were "consent orders".

The appellate court says:

R. 313:

"Furthermore, the three orders of September 7 appear from the record to be consent orders, and of course no right of appeal exists in appellant with respect to them."

The assertions of the conciliation commissioner and of the creditors that the farmer debtor "consented", or "stipulated" or "agreed" that his cows, bull, horses, sows, farm machinery and crops were "perishable," and that \$6,375 rental and \$6,375 extra principal payments making a total of \$12,750 to be paid within 2 years, 8 months and 13 days, was "usual customary rental, net income and earning capacity of the property" or within "the debtor's ability to pay with a view to his financial rehabilitation", Section 75 (s) (2), are vigorously denied by the farmer debtor, by Attorney Dazey, and by Attorney Coulson. R. 32 paragraph 10. R. 34, top of page. R. 34-35. R. 93, paragraph 7. R. 94, paragraphs 8 and 9. R. 94 to 95. R. 142 to 144, paragraph 6. R. 144, paragraphs 8 to 11. R. 146, paragraph 15. R. 147, paragraph 16.

The circumstances, as well as the record, cry out that the orders of August 13, fixing rental and extra payments, and of September 7, 1940, to sell do not qualify to enter the legal category of "consent orders".

5.

The point that the District Court "Had no power" to hear the petitions for review.

The appellate court at R. 214 in the last paragraph of the opinion says: "The District Court followed the statute and it had no power to do otherwise."

The District Court by its own statements in *In re Madonia*, (1940), 32 Fed. Sup. 165, discussed at No. 31 at page 25 of the "Supplemental Brief" herein) had already held it had adequate power.

The following Circuit Court decisions also held that it had that power:

Thummess v. Von Hoffman, CCA 3, (1940), 109 Fed. (2d) 291, discussed at No. 53, at page 40 of "Supplemental Brief" herein;

In re Albert, CCA 2, (1941), 192 Fed. (2d) 393. Discussed at No. 1, page 2 of "Supplemental Brief" herein;

Miller v. Hatfield, CCA 6, (1940), 111 Fed. (2d) 28, discussed at No. 33, at page 26 of "Supplemental Brief" herein;

Biggs v. Mays, CCA 8, (1942), 125 Fed. (2d) 693. (reported after the petition and brief for certiorari herein were prepared);

Bogum v. Johnson, CCA 8, (1942), 127 Fed. (2d) 491, (also reported after the petition and brief for certiorari herein were prepared.)

These five Circuit Courts of Appeals decisions from four different circuits held, contrary to the appellate court below, that Section 39(c) is not a limitation upon the juris-

diction of the court to hear a petition for review but merely a codification of a long standing rule of procedure. They held that Section 2 (10) and Section 38 are controlling and give a bankruptcy court ample power to hear a petition for review filed out of time.

The same district court, as noted in the *Madonia* case, had theretofore held with the same decisions. As is seen at R. 175 and R. 177, the sole basis for dismissing the petition for review was that the district court was "without jurisdiction" to hear and review them.

The following are other district court decisions in the same vein:

In re Amsterdam, District Court (1940), 35 Fed. Sup. 618, discussed at No. 2 at page 2 of "Supplemental Brief" herein;

In re Ragozinno, District Court (1941), 37 Fed. Sup. 524, discussed at No. 42, page 34 of "Supplemental Brief" herein;

In re Fergus Falls, District Court (1941), 43 Fed. Sup. 355, discussed at No. 17, page 16 of "Supplemental Brief" herein.

Authority in Support of the Specification of Errors.

The fifteen specifications of errors which are presented at pages 11 to 15 of this brief are based upon and follow "The Questions Presented" and the "Reasons Relied Upon for Allowance of a Writ of Certiorari" at pages 10 to 24 of the Petition for Certiorari.

As briefly as possible the authority in support of each specification of errors will be presented.

In Support of Specification of Error 1.

The appellate court erred in holding that the District Court did not have jurisdiction to hear a petition for review which was filed within the four months period following approval of appraisal fixed by Section 75(s).

The express provisions of Section 75 (s) is "That in proceedings under this section either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

The words "this section" can mean only "Section 75," and all of the section. It can not by judicial legislation be amended to read only some particular part of it.

In *Benitez v. Bank*, 313 U. S. 170, discussed at No. 5 at page 5 of the "Supplemental Brief" herein, this court established that the meaning of the words "this section" is "hardly open to question", it means this section 75.

Cole v. HOLC, CCA 8, (1942), reported so far only in Bankruptcy Law Service at paragraph 53877, was a case where, after ten days but within four months, a petition for review was filed to an order fixing the appraisal and the rental. It was held that the four months provision in Section 75 overrides the ten days provision of Section 39(c).

There was reason for this provision in Section 75. It was imagined that farmer debtor proceedings would **not** be subjected to vigorous and sustained attack. Therefore it was provided that the farmer debtor should need no attorney and that the conciliation commissioner should assist in all procedure. Section 75(q). It was supposed that the procedure would pass quickly out of Section 75(a) to (r) and into Section 75(s) and that any appeals could be collected

and taken all at once while the three year stay was running. This error in prophecy should not annul the plain provision of the statute.

In Support of Specification of Error 2.

The appellate court erred in holding that the district court had no jurisdiction to hear a petition for review which was filed within 10 days after the denial of a petition for rehearing of an order complained of, no right having intervened, and said petition for rehearing having been entertained and considered, and the entire proceeding having been considered by the conciliation commissioner.

A long and impressive array of decisions of this court from the beginning of American jurisprudence to the present has established this principle of law:

A petition for rehearing of an order, seasonably made when no right has intervened, if entertained and considered by the court, expunges the finality of that order for the purpose of appeal so that the time for appeal begins to run from the denial of the petition for rehearing.

The cases in which this rule is imbedded are here listed:

In the following cases the petition for rehearing was filed after time for appeal had expired.

Brockett v. Brockett (1844), 43 U.S. (2. How.) 238, No. 10 at page 9 of "Supplemental Brief" herein.

Washington v. Bradley (1869), 74 U.S. (7. Wall.) 575, discussed at No. 61 at page 46 of "Supplemental Brief" herein.

Slaughter House Cases (1870), 77 U. S. (10 Wall.) 273, discussed at No. 49 at page 37 of "Supplemental Brief" herein.

Memphis v. Brown, (1877), 94 U.S. (4 Otto) 715, discussed at No. 32 at page 26 of "Supplemental Brief" herein.

Morse v. United States, (1926), 270 U.S. 151, discussed at No. 35 at page 29 of "Supplemental Brief" herein. Note: In this case the issue was whether a motion for leave to file a motion for rehearing had the usual effect upon the time for appeal. The motion for leave was filed long after the time for appeal had expired, yet the opinion makes no mention of that fact. Several decisions where a petition for rehearing was filed after time were cited. See the discussion at No. 35 at page 29 of "Supplemental Brief" herein.

Gypsy v. Escoe (1927), 275 U.S. 498, discussed at No. 22 at page 19 of "Supplemental Brief" herein.

United States v. Seminole, (1937), 299 U. S. 417, discussed at No. 58 at page 44 of "Supplemental Brief" herein.

Wayne v. Owens-Illinois, (1937), 300 U.S. 131, discussed at No. 62 at page 46 of "Supplemental Brief" herein.

Rowman v. Lopereno, (1940), 311 U. S. 262, discussed at No. 8A at page 7 of "Supplemental Brief" herein.

In the following case there is nothing to show whether the petition for rehearing was filed within time for appeal but the decisions cited in the opinion show that the court

considered a petition for rehearing filed after time had the usual effect on the time for appeal.

Texas v. Murphy, (1884), 111 U.S. 448, discussed at No. 52 at page 39 of "Supplemental Brief" herein.

In the following cases there is nothing to show whether the petition for rehearing was filed within time for appeal time for appeal, and there is nothing to show that the point was considered to be of any importance.

Goddard v. Ordway, (*Phillips v. Ordway*), (1880), 110 U.S. (11 Otto), 745, discussed at No. 21 at page 18 of "Supplemental Brief" herein.

Northern v. Holmes, (1894), 155 U.S. 137, discussed at No. 38 at page 31 of "Supplemental Brief" herein.

Chicago v. Basham, (1919), 249 U.S. 163, discussed at No. 13 at page 11 of "Supplemental Brief" herein.

Citizens v. Opperman, (1919), 249 U.S. 448, discussed at No. 14 at page 12 of "Supplemental Brief" herein.

In the following cases the petition for rehearing was filed within time for appeal but the citations of other decisions in which the petition for rehearing was filed after time show that whether within or without time for appeal was considered immaterial or there is nothing to indicate that the court considered the distinction to be of any importance.

Asper v. Billings, (1893), 150 U.S. 31, discussed at No. 4 at page 3 of "Supplemental Brief" herein.

Voorhees v. Noye, (1894), 151 U. S. 135, discussed at No. 60 at page 45 of "Supplemental Brief" herein.

Kingman v. Western, (1898), 170 U.S. 675, discussed at No. 30 at page 24 of "Supplemental Brief" herein.

United States v. Ellicott, (1912), 223 U.S. 524, discussed at No. 56 at page 42 of "Supplemental Brief" herein.

A few decisions of the Circuit Courts of Appeals are here cited to show that the rule is generally followed in the lower courts.

West v. McLaughlin, (1908), CCA 6, 162 Fed. 124, discussed at No. 64 at page 52 of "Supplemental Brief" herein.

Cameron v. National, (1921), CCA 8, 272 Fed. 874, discussed at No. 11 at page 10 of "Supplemental Brief" herein.

Harris v. Mills, (1939), CCA 10, 106 Fed. (2d) 976, No. 25 at page 20 of "Supplemental Brief" herein.

The rule is generally recognized by the bar. Hughes, "Federal Practice," Section 5698:

"The time within which an appeal may be taken begins to run from the date of entry of the judgment or decree, unless a **petition for rehearing has been made at the same term, and is entertained by the court, in which case the time limited for an appeal does not begin to run until the application is disposed of, though this is at a subsequent term.** . . ."

The Chairman of the Supreme Court Advisory Committee in the formulation of the new Federal Rules of Civil Procedure said on the subject of a motion for rehearing:

"When it" [an application for rehearing] "is denied, then you have your full time after that motion is denied to take your appeal. It does not merely cut out a section of time but **it destroys the finality of the**

judgment, and even though the time for making a motion for a new trial under the rules has ended, if you make a motion for leave to file a motion for a new trial after the time has expired, even though it isn't seasonable, and the lower court entertains your motion on the merits and then decides it—that has obliterated the finality of the judgment and you don't have to take an appeal until the three months or thirty days, as the case may be, from the time the order is made denying your motion for a new trial." Quoted from the Statement of Honorable William D. Mitchell, Chairman, Supreme Court advisory committee, in the preparation of the Rules of Civil Procedure, reported in "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute," Cleveland, Session 1938, page 371.

It has often been held that a proceeding in bankruptcy is one suit from start to finish, that there are no terms in bankruptcy, and that a bankruptcy court may at any time reconsider any former action so that the time of the entry of the original order would have no effect on the time for appeal. This makes inapplicable, in cases arising under the bankruptcy power, the limitation that the application for rehearing must be made within term.

Sandusky v. National Bank, (1875), 90 U. S. (23 Wall.) 289, discussed at No. 47 at page 36 of "Supplemental Brief" herein.

Wayne v. Owens-Illinois (1937), 300 U. S. 131, discussed at No. 62 at page 46 of "Supplemental Brief" herein.

Borchard v. California, (1940), 310 U. S. 311, discussed at No. 8 at page 6 of the "Supplemental Brief." Note: The principal was applied. This subject is not mentioned but the several orders in the case entered in preceding years were held not binding on the parties and considered of no effect.

Circuit Courts of Appeals decisions:

In re Burr, (1914), CCA 2, 217 Fed. 106, discussed at No. 10A at page 10 of "Supplemental Brief" herein.

In the Matter of Pottasch, Central v. Irvin, (1935), CCA 2, 79 Fed. (2d) 613, discussed at No. 40 at page 32 of "Supplemental Brief" herein.

In re Jayrose, (1937), CCA 2, 93 Fed. (2d) 471, discussed at No. 28 at page 22 of "Supplemental Brief" herein.

In re Albert, Brooklyn v. Albert, (1941), CCA 2, 122 Fed (2d) 393, discussed at No. 1 at page 2 of "Supplemental Brief" herein.

In re Mercur, (1903), CCA 3, 122 Fed. 384, discussed at No. 32A at page 26 of "Supplemental Brief" herein.

In re Jemison, (1902), CCA 5, 112 Fed. (2d) 966, discussed at No. 28A at page 23 of "Supplemental Brief" herein.

In re Ives, (1902), CCA 6, 113 Fed. 911, discussed at No. 27 at page 22 of "Supplemental Brief" herein.

In re Hamilton, (1913), CCA 7, 209 Fed. 596, discussed at No. 23 at page 20, of "Supplemental Brief" herein. **This is the circuit to which certiorari is granted in this cause.**

First v. Belle Fourche, (1907), CCA 8, 152 Fed. 64, discussed at No. 18 at page 16 of "Supplemental Brief" herein.

This principle that the filing and entertaining of an application for a rehearing or a new trial stays or expunges the finality of the order or judgment on which a rehearing

is sought is of ancient origin and is universally recognized.

The federal statute reads:

"No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court shall be allowed or entertained unless application therefor be made **within three months after the entry** of such judgment or decree," . . . 28 U. S. C. 350.

This general form of statute is found in every state. It is never literally followed—the original entry is, by a fiction, held to be obliterated by the filing of an application for rehearing.

It is probably true that in the majority of cases coming into this court and heard on certiorari or appeal applications for rehearing have been made below and denied. No doubt in the vast majority of all of the cases heard by this court, the application for certiorari or for appeal has been made more than the statutory period "**after the entry**" of the order complained of. As this court has explained in *Gypsy v. Escoe* (1927), 275 U. S. 498, and in many other opinions, and as legal text writers have stated, the filing of an application for rehearing destroys the finality of an order so that, for the purpose of seeking a review, the finality dates at the denial of the application for rehearing, and not from "the entry."

In practice it rarely occurs that an application for rehearing is made and granted and after hearing the original order is formally reissued.

The same principle is followed in the motion for a new trial of a law case. The motion for a new trial is heard and denied and from the denial the time for seeking appeal or error begins to run. The law court never tries the case over again before denying a motion for new trial.

There is sound reason for the rule. By permitting the aggrieved party to make application for rehearing without jeopardizing his right to seek review if he fails to obtain a hearing, two things are accomplished:

1. If, when the court entertains and considers the application for rehearing, it becomes convinced that it was in error, the error may be corrected. Thus the time and expense of seeking, arguing, and deciding a case on review is made unnecessary. This is advantageous to the public, to the courts, and to the litigants.

2. If upon entertaining and considering the application for rehearing, the court denies it, the points at issue are thereby, at least, cleared up in the minds of the judges, the litigants and their counsel. The result is a more clear cut delineation of the issues before the reviewing court.

In Support of Specification of Error 3.

The appellate court erred in holding that the district court had no jurisdiction to hear a petition for review of a void order of a conciliation commissioner unless such petition for review was filed within ten days of the entry of such void order.

The order of August 13, 1940, for extra principal payments was made without notice to the farmer debtor or to any creditor (except of course the creditors presenting the motions on that day). It is void. R. 9, entry of August 13, 1940.

A few specific authorities upon this precise subject of hearing before a referee in bankruptcy proceedings will suffice.

Remington on Bankruptcy, in Section 27 relating to Celerity of Proceedings, says:

"While proceedings in bankruptcy may be summary, they should not be so summary as to deprive a party of those fundamental rights that belong to every citizen, among which are the rights to be advised by the demand made upon him, and after being so advised, to have a reasonable time to prepare his defense and produce his witnesses."

Likewise in his Chapter XXXVI on Summary Jurisdiction over the Bankrupt, Remington says in Section 2406:

"Reasonable notice must be served on the bankrupt or other party upon whom the order is requested so that he may have reasonable time to prepare for his defense."

In Section 2408:

"Due hearing must be had, and reasonable opportunity therefor is requisite."

In support of the foregoing statements Remington quotes at length from three opinions: (1), *In re Rosser*, 111 Fed. 106, discussed at No. 44 at page 35 of "Supplemental Brief" herein; (2) *Boyd v. Glucklich*, 116 Fed. 131, discussed at No. 9 at page 8, of "Supplemental Brief" herein, and (3) *In re Frank*, 182 Fed. 794, discussed at No. 19 at page 17 of "Supplemental Brief" herein. These decisions relied upon the decision of this Court in *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 368, discussed at No. 20 at page 18 of "Supplemental Brief" herein. Other decisions are in the same tenor: *Morgan v. U. S.*, 304 U. S. 1, discussed at No. 34 at page 28 of "Supplemental Brief" herein; *Holden v. Hardy*, 169 U. S. 366, 389, discussed at No. 26 at page 21 of "Supplemental Brief," and *Coe v. Ar-*

mour, 237 U. S. 413, 426, discussed at No. 15 at page 13 of "Supplemental Brief" herein.

In Support of Specification of Error 4.

The appellate court erred in holding that the district court had no jurisdiction, while a farmer debtor proceeding was still pending, to hear a petition for review of an order entered by a conciliation commissioner, regardless of when such petition for review was filed.

It is to be remembered that the district court dismissed the petitions for review on the ground that it **had no jurisdiction.**

Please refer for authority for this specification to the preceding list of decisions at pages 39 and 40 holding that the bankruptcy is one suit and there are no terms in bankruptcy, so that a bankruptcy court may reconsider an order at any time.

In Support of Specification of Error 5.

The appellate court erred in holding that Section 39(c) of the Bankruptcy Act in naming ten days for the filing of a petition for review is a statutory limitation and not a rule of procedure.

Section 39(c) is subject to Section 2(10) and Section 38 of the Bankruptcy Act. That section 39(c) is the enactment of a rule of procedure which remains such is attested:

By Section 2(10) of the Act which provides that courts of bankruptcy are invested with original jurisdiction to

consider and reverse or remand with instructions, the records, findings and orders of referees.

By Section 38 which makes the referees' jurisdiction and proceedings always subject to review by the judge.

The courts have overwhelmingly so held:

Second Circuit:

In re Albert, Brooklyn v. Albert, CCA 2, 122 F. (2) 393, discussed at No. 1, page 2 of the "Supplemental Brief" herein.

Third Circuit:

Thummes v. Van Hoffman, CCA 3, 109 F. (2) 291, discussed at No. 53 at page 40 of the "Supplemental Brief" herein.

Sixth Circuit:

Miller v. Hatfield, CCA 6, 111 F. (2) 28, discussed at No. 33 at page 26 of the "Supplemental Brief" herein.

Eighth Circuit:

Biggs v. Mays, CCA 8, (1942), 125 Fed. (2d) 693.

(This opinion was reported after the petition for certiorari was filed in this case.)

The court said:

"Section 39, sub. (c) providing that an aggrieved party may petition for a review of the order of a referee, is not a condition upon the jurisdiction of the court. It in no way limits the power of the court, but is merely procedural. It limits only the right of an aggrieved party without impairing the power or discretion of the court. *Thummes v. Van Hoffman* (CCA 3rd Cir.), 109 F. (2d) 291; *In re Albert* (CCA, 2nd Cir.), 122 F. (2d) 393, 394. The powers of the judge as a court of bankruptcy are defined in the statutes and in the General Orders. Section 2(10) of the Act (11 U. S. C., Sec. 11), states that the courts of bankruptcy

have jurisdiction to 'Consider records, findings and orders certified to the judges by the referees, and confirm, modify, or reserve such findings and orders, or return such records with instructions for further proceedings.' Section 38 of the Act (11 U. S. C. Sec. 66) provides that 'Referees are hereby invested, subject always to a review by the judge, with jurisdiction to * * * (6) perform such of the duties as are by this title conferred on courts of bankruptcy * * *.' In *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137, the Supreme Court said: 'The (bankruptcy) court has the power, for good reason, to revise its judgments upon reasonable application and before rights have vested on the faith of its action'."

Bogum v. Johnson, CCA 8 (1942), 127 Fed. (2d) 491.

(This opinion also was reported after the petition for certiorari was filed in this case.)

"The manner in which a review of a Referee's order may be obtained as a matter of right is prescribed by C. 575, Sec. 1 of the Chandler Act of June 22, 1938, 52 Stat. 858, 11 U. S. C. A. Sec. 67, sub. c [Section 39(c)], but this provision does not purport to impose any limitation upon the discretionary power of the District Court to assume jurisdiction to make a review."

The district court below itself so held shortly before the final orders in this case were entered, *In re Madonia*, District Court Illinois, 32 Fed. Sup. 165, discussed at No. 31 at page 25 of the "Supplemental Brief" herein.

Other district court decisions have held the same:

In re Amsterdam, District Court of New York, 35 Fed. Sup. 618, discussed at No. 2, at page 2 of the "Supplemental Brief" herein.

In re Ragozinno, District Court of New York, 37 Fed. Sup. 524, discussed at No. 42 at page 34 of the "Supplemental Brief" herein.

In re Fergus Falls, District Court of Minnesota, 43 Fed. Sup. 355, discussed at No. 17 at page 16 of the "Supplemental Brief" herein.

In Support of Specification of Error 6.

The appellate court erred in holding that Section 2(10) of the Bankruptcy Act is limited by Section 39(c) of that act.

Please see the authority listed under the preceding "Specification of Error 5."

In Support of Specification of Error 7.

The appellate court erred in holding that Section 38 of the Bankruptcy Act is limited by Section 39 (c) of that Act.

Please see the authority listed under the preceding "Specification of Error 5."

In Support of Specification of Error 8.

The appellate court erred in holding, in a former debtor proceeding pending before a conciliation commissioner where a petition for rehearing of an order is filed, no right having intervened, and where also said petition for rehearing is entertained by the conciliation commissioner who overruled a motion to dismiss it for lack of jurisdiction to entertain it, and considers the whole proceeding and then denies the petition, that the time for seeking a review of said order does not run from the date of the denial of such petition for rehearing.

This court has repeatedly stated in its twelve unanimous opinions upholding Section 75 that it was enacted for a purpose which may not be defeated by narrow constructions. They are:

Wright v. Vinton (1937), 300 U. S. 400;

First v. Beach (1937), 301 U. S. 435;

Adair v. Bank (1938), 303 U. S. 350;

Wright v. Union (1938), 304 U. S. 502;

John Hancock v. Sartels (1939), 308 U. S. 180;

Gray v. Union (1939), 308 U. S. 523;

Morrison v. Federal (1939), 308 U. S. 524;

Kalb v. Feuerstein (1940), 308 U. S. 433;

Borchard v. California (1940), 312 U. S. 311;

Wright v. Union (1940), 311 U. S. 273;

Benitez v. Bank (1941), 313 U. S. 270;

Wright v. Logan (1942), 315 U. S. 139.

Section 75 differs in many important respects from the other four provisions for the relief of debtors.

(1) Section 75(q) provides that:

"A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section."

There is placed upon the conciliation commissioner the duty to protect all of the rights of the farmer debtor. He may not take the attitude of a referee in regular bankruptcy that "Whatever is all right with the creditors is all right with me." Quite contrary to the situation in regular bankruptcy the creditors in a farmer debtor proceeding do not control it.

(2) "Any farmer failing to obtain the acceptance" of a composition or extension proposal "or if he feels himself aggrieved by the composition and/or extension, may amend his petition . . ."

(3) Contrary to all other debtor provisions under Chapter VIII of the Bankruptcy Act there is no authority in Section 75 for dismissing a farmer debtor case.

(4) Contrary to all other such statutes there is no provision for finding that a farmer debtor petition is filed in good faith or dismissing it.

(5) The right of the farmer debtor to redeem may not be cut off by a request for a public sale. *Wright v. Union Central*, 311 U. S. 273.

(6) The statute quite clearly was enacted to accomplish a purpose. The ultimate goal is the opportunity of the farmer debtor to redeem after a three year stay under Section (75s). That purpose can not be thwarted by indirectly accomplishing a forbidden dismissal through the

device of (1) a foreshortened stay and rental period, (2) unreasonable rent, (3) impossible principal payments, and (4) sale of all a farmer debtor's chattels so that he has not capital for earning the wherewithal for his rehabilitation, and then finally invoking the authority in Section 75(s) (3), to punish him for violation of the conciliation commissioner's orders. The conciliation commissioner would thereby be doing indirectly what the statute and the decisions of this court prohibit.

In Support of Specifications of Error 9 and 10.

Specification of Error 9.

The appellate court erred in holding that in a farmer debtor proceeding the period named in Section 39(c) of the Bankruptcy Act limits the time within which a petition for rehearing of an order may be filed with a conciliation commissioner, no right having intervened.

Specification of Error 10.

The appellate court erred in holding that a conciliation commissioner in a farmer debtor proceeding may not entertain or consider a petition for rehearing of his order except when such petition is filed within ten days of the entry of the order, even though no right has intervened.

In relation to Specifications 9 and 10, the purpose of Section 75 makes stronger the reasoning discussed under the previous "In Support of Specification of Error 1" and that under heading "In Support of Specification of Error 2" and that under heading "In Support of Specification of Error 5."

In Support of Specifications of Error 11, 12, 13 and 14.

Specification of Error 11.

The appellate court erred in sustaining the District Court in declining to hear, and dismissing, on the ground of lack of jurisdiction, a petition for review of the order of the conciliation commissioner which fixed the statutory stay and rental period in the farmer debtor proceeding to run from a date prior to the approval of the appraisal and prior to the order setting aside exemptions.

Specification of Error 12.

The appellate court erred in sustaining the District Court in declining to hear, and dismissing, on the ground of lack of jurisdiction, a petition for review of the statutory order of the conciliation commissioner which stayed proceedings and permitted possession to be retained by the farmer debtor upon payment of rental, and made the time of such stay and possession less than three years.

Specification of Error 13

The appellate court erred in sustaining the District Court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner which ordered sold as perishable property the farmer debtor's cows, bull, horses, sows, farm machinery and farm crops consisting of corn, soy beans, hay fodder, ensilage, oats, barley, rye and wheat.

Specification of Error 14

The appellate court erred in sustaining the District Court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order by a conciliation commissioner ordering the farmer debtor to pay as rental and as payments on the principal of his debts, within 2 years, 8 months and 13 days, the total sum of \$12,750 where the appraisal of all the real estate is \$16,000 and the appraisal of all the unexempt chattels is \$1,786.

The orders referred to in specifications 11, 12, 13 and 14, were void because the conciliation commissioner had no authority to issue them:

The orders in (11) and (12) fixing the statutory stay and rental period and restricting possession and payment of rental to run from a date preceding the approval of the appraisal and the setting aside of exemptions were as void as if a conciliation commissioner should fix the stay period to begin at a date more than three years preceding the entry of the stay order and then proceed to order a sale because the stay had terminated without redemption. Though there is a difference in amount of time, there is no difference in principle between the orders actually issued and the supposed one.

The orders referred to in (13) which characterized the farmer debtor's livestock, farm machinery and farm crops as "perishable" and used that device to accomplish their immediate sale, ostensibly did not interfere with the statutory stay, possession and rental period, but nevertheless effectually ended it.

The order referred to in (14) fixed rental and principal payments in the total of \$12,750 to be paid in 2 years, 8 months and 13 days, to be earned from an 80 acre dairy farm appraised at \$16,000 for real estate and \$1,786 for chattels, the chattels having been ordered sold. Such impossible orders are a nullity. If they may be accorded sanctity because issued by a conciliation commissioner in the administration of the farmer debtor law which enjoins upon him the execution of a trust if the farmer debtor confides in him [Section 75 (q)], then there is no farmer debtor law because it creates its own self destruction.

This court said in *Mitchell v. St. Maxent* (1866), 71 U.S. (4 Wall) 237: "Void process confers no right on an officer to sell property and all acts done under it are absolute nullities". In *Gaines v. New Orleans* (1868), 73 U.S. (6 Wall.) 642, this court said: "Where sales are irregular, but those who bought the property did it in good faith and without notice, they are not protected except by the bar of time prescribed by the law."

So in *Williamson v. Berry* (1850), 49 U.S. (8 How.) 495 541, this court said: "But if it [a court] act without authority, its judgments and orders are nullities; . . . " To the same effect: *Gantley v. Ewing*, (1845), 44 U.S. (3 How.) 717, 713, 714, 715; *Voorhees v. Jackson*, (1836), 35 U.S. (10 Pet.) 449, No. 59 at page 45 of the "Supplemental Brief" herein; *Thompson v. Tolmie*, (1829), 27 U.S. (2 Pet.) 157, 163.

In Support of Specification of Error 15.

The appellate court erred in sustaining the District Court in declining to hear, and dismissing, upon the ground of lack of jurisdiction, a petition for review of an order of the conciliation commissioner, when proceedings for obtaining such review had been perfected by the filing of a petition for review by a person aggrieved by such order and the serving of a copy of said petition upon the proper adverse parties, and when the conciliation commissioner had duly prepared and transmitted to the clerk his certificate on said petition for review, all in compliance with Section 39(c) of the Bankruptcy Act, such dismissal being based upon the sole reason that said petition for review was not filed within ten days after the original entry of the order complained of.

Again, it is to be noted that the district court dismissed the petitions for review for **lack of jurisdiction** and the appellate court sustained those dismissals.

Section 2(10) specifically invests the district court "with such jurisdiction . . . as will enable them to exercise original jurisdiction . . . to . . . consider records, findings and orders certified to the judges by referees . . ."

Now the conciliation commissioner duly certified his records, findings and orders to the judge and the judge had statutory jurisdiction to consider them.

CONCLUSION.

To the petitioner it appears to be evident that the decision below calls for the interpretation of the several statutes of the United States involved therein; that the decision of the court below is in conflict with the decisions of several other Circuit Courts of Appeals; that the court below has decided important questions of federal law which have not been, but ought to be, settled by this court; that it has decided the various federal questions referred to in a way conflicting with applicable decisions of this court; and that it has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned such a departure by the district court, as to call for this court's exercise of its power of supervision.

The petitioner prays that the orders of the appellate court be reversed and this case remanded to the district court for proper action in accordance with law.

Respectfully submitted,

ELMER McCLAIN,

Counsel for Petitioner.

Lima, Ohio,
September 22, 1942

APPENDIX A.

Sections of the Bankruptcy Act Which Are Involved.

Section 2. "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereinafter held, to . . . "

(10). "Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings: . . . "

Section 38. "Referees are hereby invested, subject always to a view by the judge, with jurisdiction to" . . . [conduct specified proceedings in bankruptcy matters].

Section 39. "a. Referees shall" . . . "(8) prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits: . . . "

"c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing." . . .

Section 75 follows. . .

AGRICULTURAL COMPOSITIONS AND EXTENSIONS

SECTION 75 OF THE BANKRUPTCY ACT AS
AMENDED BY—

PUBLIC 296 OF THE SEVENTY-THIRD CONGRESS
PUBLIC 60 OF THE SEVENTY-FOURTH CONGRESS
PUBLIC 384 OF THE SEVENTY-FOURTH CONGRESS
PUBLIC 439 OF THE SEVENTY-FIFTH CONGRESS
PUBLIC 696 OF THE SEVENTY-FIFTH CONGRESS
PUBLIC 423 OF THE SEVENTY-SIXTH CONGRESS

TITLE 11, SECTION 203, UNITED STATES CODE

(Reprint of Senate Document No. 55, 75th Congress)



PRESENTED BY MR. NYE
FOR MR. FRAZIER

JUNE 10 (legislative day, MAY 28), 1940.—Ordered to be printed
with certain corrections

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1940

AGRICULTURAL COMPOSITIONS AND EXTENSIONS

[PUBLIC—No. 420—72D CONGRESS]

[H. R. 14359]

AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," as amended by the Acts of February 5, 1903, June 15, 1906, June 25, 1910, March 2, 1917, January 7, 1922, May 27, 1926, and February 11, 1932, be, and it is hereby, amended by adding thereto a new chapter to read as follows:

"CHAPTER VIII

[As amended by the 73rd, 74th, 75th, and 76th Congresses]

"PROVISIONS FOR THE RELIEF OF DEBTORS

"SEC. 75. AGRICULTURAL COMPOSITIONS AND EXTENSIONS.—(a) Within thirty days after June 7, 1934, every court of bankruptcy of which the jurisdiction or territory includes a county or counties having an agricultural population (according to the last available United States census) of five hundred or more farmers shall appoint one or more referees to be known as 'conciliation commissioners', one such conciliation commissioner to be appointed for each county having an agricultural population of five hundred or more farmers according to said census: *Provided further,* That where any county in any such district contains a smaller number of farmers according to said census, for the purposes of this paragraph such county shall be included with one or more adjacent counties where the population of the counties so combined includes five hundred or more farmers, according to said census. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office for one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee¹ and in addition is a resident

¹ Sec. 35 of Chandler Act, Public, 606, of the 75th Cong., requires all new referees to be attorneys.

of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

"(b) Upon filing of any petition by a farmer under this section there shall be paid a fee of \$10 to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, a fee of \$25 for each case submitted to him, ~~and when docketed, to be paid out of the Treasury to be paid out of the Treasury when the conciliation commissioner completes the duties assigned to him by the court.~~ A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of \$5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment, and assistance furnished him by other Federal officials, or by any State, county, or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived.

"(c) At any time within 5 years after March 3, 1933, prior to March 4, 1934, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

"(d) After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

"(e) The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

"(f) There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer's estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any supplementary inventory filed by a committee of the creditors.

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims.

"(h) A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

"(i) The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

"(j) The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer's affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided*, That the provisions of this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under title 11, chapter 3, section 24,

of the United States Code, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

"(k) Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured.

"(l) Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided,* That the debts having priority of payment under title 11, chapter 7, section 104, of the United States Code, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition, or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

"(m) The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and that knowledge thereof has come to the petitioners since the confirmation thereof.

"(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirma-

tion of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act."

"(q) A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

"(r) For the purposes of this section, and section 4 (b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy

farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and

earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold, or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee; when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed \$35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of

this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession; and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection(s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

"(5) This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Section, as well as to future cases. All cases under this Section that have been dismissed by any conciliation commissioner, referee, or Federal Court because such Court erroneously assumed or held that subsection(s) of section 75 of this Act was unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section."

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceeded to liquidate the estate."

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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 26

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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IN THE
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No. 26

HENRY ANTON PFISTER, *Petitioner*,

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Preliminary Statement.

In this reply brief counsel for the petitioner will eschew any reference to the several aspersions which are found through the Respondents' brief and confine it to the appropriate issues.

All emphasis in this reply brief is supplied unless otherwise noted.

References herein to the "Supplemental Brief" are to the separate brief of 53 pages, containing discussions of cases alphabetically arranged and numbered from No. 1 to No. 67.

The Order of This Reply Brief.

This reply brief will reply to the respondents' brief in the same order of that brief, using the paging of the respondents' brief as headings.

Reply to Respondents' Brief Page 2.

(Under Heading "Concise Statement of Facts")

At the bottom of page 2 of respondents' brief, "September 28, 1940" is evidently a typographical error. The former debtor's petition was filed **February** 28, 1940. R. 2, R. 14.

Respondents' Brief Pages 3 to 15.

(The remainder of the Heading "Concise Statement of Facts")

As to the remainder of the respondents' "Concise Statement of Facts" appearing on pages 3 to 14, many statements appear there which are considered to be erroneous. As they are repeated in the respondents' "Argument," they will be noticed under that heading of this reply brief.

REPLY TO RESPONDENT'S "ARGUMENT"

beginning at page 14 of Respondent's Brief.

Paragraph numbered 1 at the top of page 15 of

(Under the Headings: "A. General Nature of Orders."

"1. Their relation to substantive rights.")

Paragraph numbered 1 to the top of page 15 Respondents' Brief.

The respondents' brief says that the farmer debtor's petition stated that his moratorium began running on April 26, 1940, which date preceded the stay order by nearly four months. It is true his petition contained that erroneous statement.

But Section 75 (s) (2) without qualification makes the three year stay run for a period of three years after all the "conditions set forth in this section have been complied with" (that is, after the appraisal and setting off of exemptions) and that "during such three years the debtor shall be permitted to retain possession." It is suggested that the farmer debtor could not by his pronouncement foreshorten this statutory mandate. In *Borchard v. California Bank*, 310 U. S. 311, the stipulations of the farmer debtor and the mortgage holder embodied in orders of the bankruptcy court were not permitted to override this provision.

But the present importance of the **foreshortened stay period of 2 years, 8 months and 13 days** is in relation to the the total rental and additional payment orders to pay \$12,750 within that time.

**Paragraph numbered 2 and 3 at the Middle
of Page 15 of Respondents' Brief.**

The respondents' brief says that "debtor now complains of the amount of the rent" and that the rent and principal payment orders were entered "pursuant to his own suggestion and within the limits of his consent."

The record, at R. 9, entry of August 13, shows that on August 13, three of the respondents moved that rental and principal payments be ordered totaling \$12,750, to be paid in certain installments which they also named. **Reference is made to the rental order at R. 75 and 76 where the installments and the totals are seen to be identical with the respondents' motion noted at R. 9 in the entry of August 13.**

The record at R. 9, entry of August 13, also shows "hearing on motion; motion allowed as per order (Dft). **Objection by debtor, hearing thereon and objection overruled.**"

Thus the record shows the order of August 13 fixed \$12,750 rent and extra payments **precisely as respondents moved**, and over the objection of the farmer debtor. Nowhere in the order of August 13, found at R. 72 to 77 is there any consent by the farmer debtor. But even if he had "consented," we think the order is shocking and so not beyond review.

**The Unnumbered paragraphs on Page 16
of Respondents' Brief.**

Respondents' brief says an order was entered that the farmer debtor be prevented from removing soil or personal

property and to account to the conciliation commissioner for sale of farm produce. If such an order was entered, it is not in issue. But no such order is in the record anywhere. At R. 7, referred to by respondents' brief, Entry of June 29, there is noted a motion to the effect stated. But no order is noted, and the entry says "Hearing on all motions continued". The later entries contain nothing further on the subject. At R. 158 and 159, the conciliation commissioner said in his opinion and decision on the petition for rehearing of the order of August 13 that on June 29 "it was further ordered," etc., and no money was turned in, but that statement is not an order. The meeting of June 29, R. 7, was a creditors' meeting under the original petition for composition or extension, still under Section 75 (a) to (r). The conciliation commissioner had no power to make such an order. Section 75 (a) to (r) for composition or extension affords an opportunity to submit a proposal to creditors, not to require the farmer debtor to pay his farm receipts into court. Thereafter on July 9 he was given fifteen days to file his amended petition under Section 75 (s). R. 7, entry of July 9. He filed it on July 19, R. 3, entry of July 19, and he was adjudicated a farmer debtor bankrupt on July 20, R. 3, entry of July 20. It was referred back to the conciliation commissioner on July 23, R. 8, entries of July 23.

As to rent and principal payments the amounts were absolutely impossible to pay out of an 80 acre 20 cow dairy farm.

**The Citation on Page 17 of John Hancock
v. Bartels, 308 U. S. 180.**

No reason is apparent for this citation. The Bartels mortgage holder's allegations made to the district court

in its petition for dismissal are set out at page 182 of the Bartels opinion. Among them was one that farmer debtor Bartels' proposal was "apparently for the sole purpose of hindering and delaying his creditors." The district court granted the petition and dismissed the proceeding. This court reversed it saying, at page 183: "the District Judge failed to follow the mandate of the statute." At page 186 this court said: "The court is directed to stay all proceedings against the debtor or his property for three years, and during that time the debtor may retain possession". And at page 186 this court also said "the court may order any unexempt perishable property, . . . or any unexempt personal property **not reasonably necessary for the farming operations**" to be sold.

Reply to Respondents' Brief Page 17.

(Under Heading "B. Decision of District Court")

**Bottom of Page 17, Citation of In re Madonia,
32 Fed. Supp. 165.**

This is a decision of the district court below. The respondents' brief says of that case "It is clear leave was asked and extension granted." The reported opinion shows that no such leave was asked or granted. There were two petitions for review, but only the first is involved in the opinion and it was filed within ten days. No copy was served on the adverse party who moved to strike the petition for review for lack of notice. He relied upon Section 39 (c) which provides that an aggrieved person may **within ten days** "file with the referee a petition for review **and serve a copy upon the adverse parties.**" The referee granted the motion to strike and to his order a second petition for review was filed and a copy served, both within ten days after the order to strike.

It was argued that the provision for filing a petition for review and serving copies within ten days was jurisdictional and therefore the district judge had no power to hear the first petition for review because a copy was not served within ten days. (No copy had been served at any time). The opinion answered this argument thus: "I can not agree. Statutes granting a right of review of the order of the court should be liberally construed, so that if error occurs it may be corrected."

This demonstrates that the district court below in the *Madonia* case considered that it had jurisdiction to hear a petition for review not filed within ten days even though no application for extension of time was made.

The opinion was based on *Thummess v. Von Hoffman*, CCA 9 (1940) 109 Fed. (2d) 291, which is quoted at No. 53, page 40 of the petitioner's "Supplemental Brief" filed herein. As shown in the *Madonia* opinion and in the *Thummess* opinion, whether or not a petition for an extension of time is filed is immaterial. It is a question of power. The power is granted in Section 2 (10) of the Bankruptcy Act and (quoting from the *Thummess* opinion), "No question as to the jurisdiction of the bankruptcy court to entertain a petition for review is involved by Section 39, sub. (c)." The *Thummess* opinion thoroughly discusses the history of petitions for review and shows that in some jurisdictions there was no time set for filing. The formality of an application for extension is immaterial—the court still has power under Section 2 (10). Lack of an application could not destroy that power. But as the Sixth Circuit held in *Miller v. Hatfield*, CCA 6 (1940), 111 Fed. (2d) 28, a petition for rehearing made to a conciliation commissioner in itself extends the time for filing a petition for review of the order to which the petition for rehearing is directed. This *Miller* case is discussed and quoted at No. 33, pages 26 to 28 of the Supplemental

Brief. There the petition for rehearing was filed with the conciliation commissioner long after the ten days named in Section 39 (c) for filing a petition for review.

Near the middle of page 18 of respondents' brief is cited *In re L. & R. Wister and Company*, 237 Fed. 793, which is again cited, and quoted, at pages 30 and 31 of respondents' brief and this reply brief will discuss it under that page heading.

Reply to Respondents' Brief Page 18.

(Under Heading "C. The Opinion of Circuit Court of Appeals")

The farmer debtor has not abandoned his conception of the relation between Section 75 (s) and Section 39 (c) as to petitions for review. Section 75 (s) provides four months and Section 39 (c) provides ten days. As the definition of a "farmer" in Section 75 (r) overrides that in Section 1 (17) where there is a conflict, so Section 75 (s) overrides Section 39 (c) where they conflict.

Reply to Respondents' Brief Pages 19 and 20.

(Under the Heading "2. The petitions for rehearing filed herein were not sufficient to revive the right of review lost by failure to file such petition within the period prescribed by Section 39-C.")

The issue is whether an application for rehearing of an order must be made within time for appeal in order to suspend or destroy the finality of that order for the purpose of appeal.

The analysis of the twelve cases relied upon to support the opinion of the appellate court below (three were named and nine were lumped together as "analogous cases") is as correct as could be made. Where there is any doubt it was resolved in favor of the appellate court's opinion.

Contrary to the statement made in respondents' brief, in **four** of the twelve cases (two of which were directly cited in the opinion of the appellate court) the statements in the opinion of the appellate court below were incorrect in each instance. That is, in each of the four cases:

- (1) The petition for rehearing was **not** granted;
- (2) The old judgment was **not** vacated;
- (3) A new judgment was **not** entered;
- (4) And the petition for rehearing was **not** filed **within time** for appeal.

These four cases are:

- (1) *Brockett v. Brockett* (1843), 43 U. S. (2 How.) 283.
- (2) *Gypsy v. Escoe* (1927), 275 U. S. 498.
- (3) *U. S. v. Seminole* (1937), 299 U. S. 417.
- (4) *Bowman v. Lopereno* (1940), 311 U. S. 262.

Furthermore, to these four cases there should be added the following **two** which, out of caution, were listed "not stated" as to statement 4. (Petition for rehearing filed within time for appeal), namely:

- (5) *Texas v. Murphy* (1844), 11 U. S. 487, in which, although it is not apparent when the application for rehearing was filed in relation to the time to seek a review, the opinion rested upon cases where the applications for rehearing were filed after time. See Case No. 52 at page 39 of the "Supplemental Brief" filed by the petitioner herein.

(6) *Citizens v. Opperman* (1919), 249 U. S. 488, which is also silent upon the point, but in which the opinion rested upon cases where the relative time element was ignored. In one of them, *Andrews v. Virginian* (1919), 248 U. S. 272, this court said the discretion of the court to deny petition for rehearing did not destroy the application of the rule as it depended upon the "*existence of the power*" to grant or deny rehearing which determined the finality of the order to which the application for rehearing was directed. In the other of the supporting cases, *Chicago v. Basham* (1919), 249 U. S. 163, this court said if a petition for rehearing "*is presented to, and entertained and considered by the court*" the order to which it is directed does not become final until the petition for rehearing is "*disposed of*". (These three cases are discussed and quoted in the petitioner's "Supplemental Brief" at: No. 14, page 12; No. 3, page 3, and No. 13, page 11).

So, in *six* of the twelve cases relied upon by the opinion of the appellate court below, that opinion is not supported.

But the subject merits further pursuit.

An examination of the **other six cases** cited in support of the opinion of the appellate court below shows that none of them lend any support whatever, for the reasons here stated:

Aspen v. Billings (1893), 150 U. S. 31. See No. 4, page 3 of the "Supplemental Brief" of the petitioner herein.

The petition for rehearing was filed within time for appeal and within term but disposed of by denial after term. The sole issue was whether carrying over to a

subsequent term destroyed the applicability of the rule. The court had terms and Equity Rule 88 provided that "no rehearing shall be granted after the term" in which the order was entered. This court held that the applicable rule was not affected for the petition for rehearing was filed in season and "**entertained by the court**" and Equity Rule 88 was "construed to mean that a rehearing can not be granted after the lapse of the term unless application is made therefor during the term, and being entertained the decree is thereby prevented from passing beyond the control of the court."

It is significant that in the following cases cited in *Aspen v. Billings* in support of the opinion, there was no requirement that the application for rehearing be within time for appeal:

Brockett v. Brockett (1843), 43 U. S. (2 How.) 283 (see No. 10, page 9 of "Supplemental Brief") where the petition for rehearing was filed after time for appeal.

Texas v. Murphy (1844), 111 U. S. 487 (see No. 52, page 39 of "Supplemental Brief") where it is not stated whether the petition for rehearing was filed before or after the time for appeal, but the opinion rested upon cases where the application was made after time.

Memphis v. Brown (1877), 94 U. S. (4 Otto.) 715, (see No. 32, page 26 of "Supplemental Brief") where *Brockett v. Brockett* (1844), 43 U. S. (2 How.) 238, is also cited

to support the opinion; and there the petition for rehearing was filed after time.

Goddard v. Ordway, (*Phillips v. Ordway*) (1880), 101 U. S. (11 Otto.) 745 (see No. 21, page 18 of "Supplemental Brief") where the application for rehearing was made after appeal was allowed, but within term, and held over and denied at a subsequent term. This court held that the application for rehearing was "made to and recognized by the court at the same term" and "entered on the minutes of the doings of the court." And that when what a paper calls for "appears on the minutes of actual proceedings, it must be presumed that the court, in some form, gave it judicial attention, and that it was presented in some regular way." (That is, the court thereby "*entertained*" the application for rehearing.) This court held that "The motion, when *entertained*, prolongs the suit, and keeps the parties in court until it is passed upon."

Another of the six cases is *Kingman v. Western* (1898), 170 U. S. 675 (see No. 30, page 24 of "Supplemental Brief").

Here the motion for a new trial was filed well within the time for appeal. But the opinion of this court cited in support of its opinion:

Aspen v. Billings (discussed above);

Brockett v. Brockett (discussed above), where the application for rehearing was filed after time to appeal.

Texas v. Murphy (discussed above), which relied upon cases where the application for rehearing was filed after time.

Memphis v. Brown (discussed above), where the application for rehearing was filed after time for appeal.

The next of the six cases is *United States v. Ellicott* (1912) 223 U. S. 524 (see No. 56, page 42 of "Supplemental Brief").

The sole issue, on a motion to dismiss on appeal, was whether a motion for new trial filed in term but overruled after term and appealed after the period for appeal from the original entry had expired extended the time for appeal. This court reiterated the rule and cited *Kingman v. Western* (which is discussed above) in its support.

Next of the six cases is *Morse v. United States* (1926), 270 U. S. 151 (see No. 35, page 29 of "Supplemental Brief").

The rule of the court of claims required **leave to file a motion for new trial** if it was to be filed after ninety days. One motion for new trial was filed within ninety days and denied. After ninety days **two applications for leave to file** a motion for new trial were denied. This court again restated the general rule that denial of an application for rehearing suspends the finality of an order to which it is directed, but it distinguished between an application for rehearing and **an application for leave to file** an application for rehearing to which, of course, the rule has no application.

In support of the general rule this court again cited numerous of its former opinions where the application

for rehearing was filed after time for appeal and held to stop the running of the time for appeal.

The next of the six cases is *Wayne v. Owens-Illinois* (1937), 300 U. S. 131 (see No. 62, page 46 of "Supplemental Brief").

At page 137 this court said (referring to the power of courts of law and equity to revise judgments) that such power was limited by expiration of the term "and not by the period allowed for appeal."

Then this court said: "There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal." (There being no terms in bankruptcy, it was held that the "term rule" had no application in a court of bankruptcy.)

At no place in the opinion did this court make it a requirement that (as happened to be the state of facts in this case), the formalities of granting a petition for rehearing, vacating the old judgment and entering a new judgment, must precede the adherence to the order as originally entered. On the contrary, in none of the cases cited in the opinion, and approved and followed, did such preliminaries exist. The decision did not require that all preceding and all following cases should involve the same procedural facts that there existed, before the rule could apply.

The next case of the six is a Circuit Court of Appeals opinion, *Carpenter v. Condor*, CCA 9 (1939), 108 Fed. (2d) 318, (see No. 12, page 11 of "Supplemental Brief").

Although the petition for rehearing was filed within time for appeal but overruled thereafter the court stated, and followed, the general rule, citing *Morse v. United States* (discussed above) where this court restated that rule and cited in its support many cases where the application for rehearing had been filed after time for appeal.

The last of the six cases is *Bowman v. Lopereno* (1940), 311 U. S. 262 (see No. 8A, page 7 of "Supplemental Brief").

In this involved case, a certain petition for rehearing was filed November 15, 1937, was filed long after the time for appeal. At page 266 of its opinion this court held that: "Treating . . . the petition of November 15, 1937, as a second **petition for rehearing filed out of time**" the time for taking appeal was enlarged.

In recapitulation of this discussion of the twelve cases which the opinion of the appellate court below held do not support the rule that an application for rehearing suspends the running of the time for appeal it may be said:

*Four of the twelve cases involved facts where:

The petition for rehearing was **not** granted;

The old judgment was **not** vacated;

A new judgment was **not** entered;

And the application for rehearing was **not** filed **within time** for appeal.

Two of the twelve cases do not disclose the situation but:

The petition for rehearing was **not** granted;

The old judgment was **not** vacated;

A new judgment was **not** entered;

And as to the application for rehearing, the opinion does not disclose whether the application for rehearing was filed before or after time for appeal but the decisions were based upon earlier adherence to the rule where the application was **filed after time**.

The other six of the twelve cases all support the rule that an application for rehearing suspends the time for appeal from the order to which it relates, without regard to whether it was filed before or after the time for appeal.

Reply to Respondents' Brief Pages 21 to 27.

(Under the Heading: "3. The circuit Court's finding that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review.")

A few points under this heading will be replied to.

For Mr. Coulson's authority and activities see:

Mr. Coulson's affidavit, R. 94 to 95.

Mr. Coulson's verification of Petition for emergency restraining order is noted at R. 34.

This verification covers the statement in the petition for emergency restraining order in paragraph 6 that the \$12,750 rental and extra payment order was not presented to or approved by either the farmer debtor or his counsel.

Mr. Coulson's verification also pertains to the statement in the petition for emergency restraining order, paragraph 8 (R. 32), that on that date, September 17, 1940, no order to sell the cattle had been issued or entered.

Mr. Coulson's verification also relates to the petition for emergency restraining order, paragraph 10, that neither the farmer debtor nor his counsel consented or stipulated that any of the farmer debtor's personal property was perishable.

Mr. Dazey's affidavit showing his incapacity is at R. 34 to 35.

THE INCAPACITY OF COUNSEL.

During all of the times the proceeding was pending before the conciliation commissioner under Section 75(s) the farmer debtor's counsel, Mr. Dazey, was incapacitated. No other counsel was authorized to represent him. It was not until September 7 at the earliest that Mr. Dazey realized what was going on, and when he did he took measures to have the whole situation examined into. How respondents would think that an incapacitated man could protect his client's rights is not clear. At any rate they still claim the advantages they gained thereby. Under this unfortunate circumstance, evidently the respondents proceeded to "make hay while the sun shines". Upon a 20 cow dairy farm they got—upon their specific **motions made and granted the same day without notice**—a total of \$12,750 rental and extra payments, ostensibly by authority of Section 75(s)(2), to be paid within 2 years, 8 months and 13 days. Then after a 25 day breathing spell they obtained authority from the conciliation commissioner to sell, as "perishable" the farmer debtor's cows, farm implements and crops. As soon as Dr. Dazey learned of the floundering proceeding it was halted. Authority for the foregoing statements. R. 34 to 35. R. 94 to 95. R. 30, paragraphs 6, 8, 10, Note of verification by Mr. Coulson at R. 34. R. 9,

entry of August 13. R. 72 to 76. R. 10, entry of September 7. R. 77 to 88. R. 146 to 147, paragraph 15.

Although the farmer debtor was without counsel, he should not have been without representation for 75(q) made it the sworn duty of the conciliation commissioner to protect the rights of the farmer debtor by assisting him. The conciliation commissioner seems to have administered the farmer debtor proceeding strictly as a referee in bankruptcy where the creditors control the proceeding and not under the farmer debtor statute which makes the conciliation commissioner the guardian of the rights of the farmer debtor under it.

Fortunately the creditors overreached their advantages and secured their orders without that due process of law which is necessary to make them valid.

Specifically referring to the statement in respondents' brief, at page 25 under heading "Sixth" that counsel for the farmer debtor "refers herein to his inability" to find the September 7 orders, counsel there repeated the factual statement in paragraph 3 at R. 90, that on September 12, 1940, "there was then in said file no entry of September 7, 1940, ordering the sale of petitioner's chattels".

A careful examination of the record discloses that the "Orders of September 7, 1940" were not in existence on September 7, 1940, when it is claimed they were entered, and did not exist until some time later. They came on the scene gradually and progressively. We will trace in the record these three orders of September 7, 1940 until they appear in their fully developed form at R. 77 to 88. We find them first in embryo.

1. R. 90, paragraph 3. Counsel for the petitioner here repeats the substance of the statement under the heading "Sixth" at page 28 of petitioner's brief and says that on September 12, 1940 (five days after the purported orders of September 7 were later said to have been entered) he (1) went to the office of the conciliation commissioner, (2) asked for the conciliation commissioner's docket and file in this cause, (3) copied every entry in the cause, (4) examined and made notes of or copied every paper in the file, "taking each paper separately therefrom and carefully reading it," (5) but there was then in the file no order of September 7, 1940, for the sale of the petitioner's chattels, and (6) there was nothing on the docket pertaining to such an order except the **docket entry of September 7** (which is copied in part in the next paragraph, and which appears in full at R. 10).

2. R. 32. At the top of R. 32 in the "Petition for Emergency Restraining Order" filed September 17, 1940, the conciliation commissioner's **docket entry** of September 7, 1940, relating to the allowance of the respondents' petitions to reclaim (now referred to as petitions to "sell") the chattels as "perishable" is copied in full. That entry concludes in these words: "prayer of petitions granted as per order (Dft)". Paragraph 8, R. 32 of the same "Petition for Emergency Restraining Order" recites that no order pursuant to the memorandum entry of September 7 had yet been issued or entered. Paragraph 9, R. 32, recites that the farmer debtor was informed and believed an order of sale was about to be issued. He had already filed a petition for rehearing of the order of August 13. (See R. 139). In paragraph 11 (R. 33), he averred that as

soon as an order of sale was issued he desired to obtain a rehearing or to file a petition for review thereof. In paragraph 12 (R. 33) he averred that it was necessary to restrain a sale until an order should first have been entered.

Mr. Coulson verified the statements made in this "Petition for Emergency Restraining Order". R. 34, top of page. Mr. U. G. Ward, an attorney, was present on September 7 at the hearing before the conciliation commissioner and says that an order was *to be prepared* (R. 108).

3. R. 10, entry of September 7. As just remarked, the memorandum on the conciliation commissioner's docket dated September 7, 1940, concludes as follows: . . . "prayer of petitions granted as per order (Dft)". The interpretation of the parenthetical letters "(Dft)" is left to the reader. The respondents have not ventured to explain it. The original, and present, interpretation of counsel for the petitioner is that "(Dft)" is an abbreviation for "Draft" which in turn means "Let an order be drafted accordingly." It was not then done.

4. R. 35 to 40. At the hearing of the "Petition for Emergency Restraining Order" on September 19 (R. 3, last entry of September 19) respondents presented their "Answer" which is pregnant with important negative evidence.

In paragraph 8 (R. 38) of their answer they "aver that orders have been entered" on September 7. They do not clearly and unequivocally say "were" entered on September 7.

In paragraph 10 (R. 38 and 39) they say that "on the 13th day of **September** [August?] AD 1940" they appeared with witnesses but Mr. Coulson waived proof and stipu-

lated that the cattle were "perishable" under Section 75. They continue to say (which is important as well appear below): "Said commissioner so found **as will appear by his findings more fully set forth in his orders thereon, a copy of ONE of which is hereto attached and marked 'Exhibit B'.**" Now this "Exhibit B" appears in full at R. 40 and it in no way recites any such "findings" by the conciliation commissioner. It merely appoints an officer and directs him to sell on September 30, 1940. But when we go to the full fledged order at R. 79 and R. 87 to 88, we find that he orders the sale to be at a "date and hour to be selected by said officer" with "at least five days' prior" notice; while at R. 81 the sale is to be on "fifteen (15) days' notice".

In paragraph 11 (R. 39) of their "Answer" they say that "said order is entered **as of**" September 7. And at R. 97 to 105, as late as September 26, we find the same respondents (bottom of R. 39, bottom of R. 105) referring five separate times to "the order" or "said order" (R. 100 and 101, paragraphs 3 and 4. R. 103, paragraph 11). They still shy away from a flat statement that three orders were entered on September 7 for we find them saying "said order prior to the time **same was entered**" and "at the time of the signing and entry hereof." R. 103, paragraph 11.

• It appears significant that on September 19, before the District Court, and later on September 26, before the conciliation commissioner, the respondents would not categorically state that on September 7 three separate orders were entered and that they did not then and there produce the three orders but referred to one order and produced something quite different—their "Exhibit B" appointing an officer to conduct a sale. The three orders

when they appear in the record at R. 77 to 80; R. 80 to 82; and 82 to 88, were something else.

5. R. 88 to 97. All of the foregoing assumed additional significance when the farmer debtor's petition for rehearing of the orders of September 7, filed September 20, is examined. In paragraph 4, R. 90, it is stated that on September 19 (at the hearing in the District Court, R. 3, last entry of September 19), **the farmer debtor first learned what he had not theretofore known, namely that three orders** were involved. But even then he did not see them and it was necessary to file on September 23 an amendment (R. 95) to his petition for rehearing in which at paragraph 10 he referred to paragraph 4 (R. 90) of the petition for rehearing and said that he did not see said "orders" until "**ONE** of them" was **shown to the court** and not until then did he know "**its contents.**" R. 96. As we know this must have been the interesting "**Exhibit B**" at R. 40, which turned out to be something different from, the **THREE ORDERS** appearing in the record at R. 77 to 88.

6. Section 75(a) makes the conciliation commissioner a referee. Section 1(9) makes the referee the court. Rules of Civil Procedure, Rule 77, makes it the duty of the court immediately upon the entry of an order to serve notice and note the service on the docket. **This was not done.**

So right up to September 26 we find all parties referring to "**an order**" and that order was "**Exhibit B**" at R. 40.

It would seem pertinent to ask: Why were the three orders not produced on September 19 if they had been entered? Why was a different order produced as Exhibit B (R. 40) on September 19 if three other and different orders were entered on September 7? Why was the refer-

ence always to **an order** up to September 26. When the farmer debtor's pleadings repeatedly referred to **an order** why did the respondents not say "There was not one but three orders and here they are and were entered on September 7"?

The conclusion of the whole matter is, that it can not be said that the record shows that these orders were entered and signed by the referee on the date of their entry in the presence of the farmer debtor. It is interesting to note the elusive statement in the second paragraph under heading "Sixth," page 25 of respondents' brief, that the conciliation commissioner "had all his books in court showing all the **docket entries**" (not the "**three orders**"). The record leaves it very doubtful, to state it lightly, whether the three orders of September 7 were entered on that date.

**The Cases cited by Respondents' Brief at
Pages 22 to 27 of Respondents' Brief.**

At pages 22 and 24 is cited *Ott v. Thurston*, CCA 9 (1935) 76 Fed. (2d) 368. The opinion repeatedly excepts "*manifest errors*" which "*invoke the sense of justice*," and so on. These we have here.

Lyon v. The Perin, 1889, 125 U. S. 839, cited in respondents' brief at page 21. Patent suit, regularly set for trial, came on for hearing and was submitted on pleadings. The court found and decreed that "the equities are with the defendant; that the bill be dismissed." The plaintiff brought another suit in another jurisdiction involving the same parties and the same subject matter. It was held the first suit was *res judicata*.

In re Brown, D. Ct., N. H. (1940), 35 Fed. Supp. 619, cited at page 27, has no bearing on this matter. It merely holds

that when a regular bankruptcy proceeding is abandoned by the bankrupt who later files a second petition, he may not receive a discharge.

Kyser v. MacAdam, CCA 2 (1941), 117 Fed. (2d) 232.

This case preceded the Second Circuit's earlier decision in *In re Albert, Brooklyn v. Albert*, CCA 2 (1941), 122 Fed. (2d) 393, (see No. 1, page 2 of "Supplemental Brief") which is cited at pages 32, 40 and 45 of the preceding brief of the petitioner herein, as one of the numerous circuit court decisions with which the appellate court and the district court below are in conflict. The opinion in declining to dismiss the appeal said "The court below granted the review and passed on the merits. We see no occasion to do otherwise." The opinion cited the opinion of the district court below in *In re Madonia*, D. Ct. Ill. (1941), 32 Fed. Supp. 165 (see No. 21, page 24 of "Supplemental Brief") and *Thummess v. Von Hoffman*, CCA 3 (1940), 109 Fed. (2d) 291 (see No. 53, page 41 of "Supplemental Brief"), both of which support the petitioner's present contentions in this court.

McIntosh v. U. S., CCA 4 (1934), 70 Fed. (2d) 507.

This is a minority decision following *Conboy v. First National* (1906), 203 U. S. 141, which is discussed later in this brief at page 30. It holds with the *Conboy* decision, and contrary to the late decision of this court in *Wayne v. Owens-Illinois* (1937), 300 U. S. 131, at page 137, that a petition for rehearing must be filed before the time for appeal has run.

Reply to Respondents' Brief Pages 27 to 29.

(Under the Heading "4. The Three Orders of September 7th, 1940, were 'consent orders' and not appealable.")

We do not believe that this suggestion is seriously relied on. We think it is lugged-in as a desperate expedient. The answer runs through all that has already been said. But lest it might be considered that possibly some of the decisions brought forward by the respondents would countenance such a conclusion in the instant case we briefly discuss them.

Pacific Railroad v. Ketchum (1880), 101 U. S. 289, cited at page 28 of Respondents' brief. This court held that a consent decree is appealable saying, as to the argument to the contrary: "We do not so understand the law." The court then proceeded to find that the consent by a corporation through its elected solicitor to foreclose in a foreclosure action, not having been challenged in the court of first instance, could not be attacked on appeal. The farmer debtor Pfister strenuously challenged the claim of consent before the conciliation commissioner and in the district court, as shown by his petition for emergency restraining order, R. 27; and his two petitions for rehearing. R. 88 and R. 139.

U. S. v. Babbitt (1882) 104 U. S. 14 (Otto) 767, cited at page 28 of respondents' brief. An army officer sued for longevity pay claiming his cadet service should be counted. The court of claims in its opinion held *contra* but the United States Attorney General consented to a judgment in favor of the officer. This court held the consent was binding. There was raised no question of the authority of the Attorney General to bind the United

States. The appeal was not dismissed, the judgment was affirmed.

Curry v. Curry, CCA DC (1935), 79 Fed. (2d) 172, page 28 of respondents' Brief. Divorce case. Wife through counsel entered into a separation agreement and obtained a decree. After paying the stipulated and awarded alimony for a long time the divorced husband, who had remarried, became financially embarrassed and could not pay, whereupon the wife brought suit to annul the divorce and the separation agreement in order to bring criminal action. The court held she had irrevocably ratified the separation agreement and the divorce. Mr. Pfister ratified nothing. His counsel did not even have any of the orders presented before entry.

Bergman v. Rhoades, 1929, 334 Ill. 143, also cited at pages 28 and 29 of respondents' brief. In the settlement of an estate legatees by counsel agreed to take land instead of money because it was found that a money settlement was impracticable. Their fully authorized counsel who had represented them for years participated in the agreement, the report and the application to the court. There was no disability and no lack of authority or knowledge.

Union Central v. Anderson, 1937, 291 Ill. 423, cited at page 29 of respondents' brief. In mortgage foreclosure the mortgagee gave notice of appeal and then proposed settlement. It secretly instructed its counsel to abandon

appeal and "watch for expiration of time". A written stipulation was drawn by counsel and the mortgagee kept it until one day after the mortgagor's time for appeal expired, and then refused to sign it, leaving the foreclosure naked. The mortgagor brought suit to cancel the mortgage alleging a trap by the mortgagee. The mortgagee was held to the stipulations made by its counsel, invoking "equitable estoppel". It said "Appellant makes reference in its brief to cases of authority and precedent, but none where the circumstances are such as exist in this case. The court can not permit its judgment, orders and decrees to thus be made the object of a designing litigant. . . . Precedent can not thus be permitted to embalm principle."

The pronouncement is commended to respondents.

American v. Industrial, 1929, 235 Ill. 332, cited in respondents' brief at page 29. Industrial compensation case. Controversy by employer over name of widow, whether it was Mrs. Hupka or Mrs. Kupka. Throughout the case she was "Mrs. Kupka" without objection by the employer who so referred to her in cross-interrogatories. After judgment the employer urged that the identity of "Mrs. Kupka" was not established. The court held it was estopped.

Reply to Respondents' Brief Pages 29 to 31.

(Under the Heading "5. The point that the District Court 'had no power' to hear the petitions for review.")

In re Wister, CCA 3, 1916, 237 Fed. 793. As already shown the Third Circuit is in the majority in holding that a petition for rehearing may be filed after a rule-fixed time

for filing. This Wister decision does not depart from its earlier and later decisions. The facts of the case set it apart. Creditor W filed a petition for review and eight months later joined with the trustee "praying that the proceedings be dismissed and the order of the referee be affirmed." Creditor S then filed an application to intervene, praying that W's petition for review be not dismissed and that he be allowed to intervene as if he had filed a petition for review. That is S *never filed any petition for review*. The application was denied. This was what he lost "by his own neglect" to file any petition for review.

In re David, CCA 3, 1929, 33 Fed. (2d) 748, cited at page 31 of respondents' brief.

This decision does not relate to the statutory provision of Section 39(c) of the Bankruptcy Act which did not then exist. It relates to a petition for a writ of certiorari which the appellate court denied. The Third Circuit is in accord with the general rule that a rule of court limiting time within which to file a petition for review is not jurisdictional. In fact its later decision in *Roberts Auto Supply v. Dattle*, CCA 3, 44 Fed. (2d) 159, is sometimes cited as a leading case on the subject.

The Third Circuit is, in principle, another circuit with which the decision below conflicts—although its decisions so far reported have been on the former rule of court and not on Section 39(c) which incorporates the rule.

In re Greek (D. Ct. Pa.), 164 Fed. 211, and *In re Marks* (D. Ct. Pa.) 171 Fed. 281, cited in the quotation of the

foregoing citation, are both Pennsylvania cases in which by express rule of the local court a petition for review had to be filed within ten days *unless the judge afterwards allowed it to be filed*, thus expressly recognizing the jurisdiction of the court to hear reviews where the petition was filed after time.

Reply to Respondents' Brief Pages 32 to 35.

(Under the heading "D. Discussion *re* Authorities on Specification of Errors.")

Reply to the respondents' statement at pages 33 to 34 that "The entire proceedings were not considered by the conciliation commissioner."

The "entire proceeding" was "considered." See: R. 13, entry of November 28, 1940. "Referee's opinion and decision on Petition for Rehearing and amendment thereto of the Order of August 13, 1940," R. 158 to 164, and the "Referee's opinion and decision on Petition for Rehearing of Orders of September 7, 1940." R. 109 to 116. These all show that the two petitions for rehearing were entertained and thoroughly considered by the court on their merits.

Reply to Respondents' Brief Pages 36 to 41.

(Under Heading "I. Section 39C and Not Section 75S of the Bankruptcy Act governs the time for filing petitions for review of the orders of Referee in farmer-debtor cases.")

The provision in Section 75 (s), first and unnumbered paragraph reads "Provided, **That in proceedings under this section, either party may file objections, exceptions**

and take appeals within four months from the date the referee approves the appraisal." It does not say in proceedings under this subsection. Section 75 in subsections (a) to (s) inclusive.

The appraisal was approved August 13, 1940. See R. 69. Four months thereafter expired December 13, 1940. By latter date, that is, without the four months period, every and appeals in the bankruptcy court. Specifically: the petition for review of the orders of September 7, 1940, was filed October 9, 1940, or **within two months**; and the petition for review of the order of August 13, 1940, was filed November 28, 1940, that is within **three months and two weeks**. Both were well within the four months period.

Now this provision in Section 75(s) means something or it means nothing. Like Section 75(r) it means what it says.

Reply to Respondents' Brief Pages 41 to 48.

(Under the Heading "Petitioner not having filed any petition for review within the time prescribed by Section 39C, and having lost his right to review thereunder, did not revive that right by the subsequent filing of the petitions for re-hearing of the orders of August 13, 1940 and September 7, 1940.")

Credit Company v. Arkansas, (1888), 128 U. S. 258.

An appeal was not filed in the Circuit Court within two years as required by law. To remedy the defect the Circuit Court **after the two years had elapsed** put on a *nunc pro tunc* order stating that it should bear a date previous to the expiration of the two years.

The quoted portion of the opinion was directed to that situation which has no relevancy to the issues here pending.

Discussion of Cases Cited and Discussed by Respondents' Brief.

Respondents' Brief Pages 43 to 44.

Conboy v. First National Bank, (1906), 203 U. S. 141.

Case cited and discussed at pages 43 and 44 of respondents' brief. This case involved a question of substantive bankruptcy law.

The decision has been thoroughly analyzed in petitioner's "Supplemental Brief," number 16, page 13. Four observations are pertinent to respondents' claims concerning it.

(1) Its internal structure is weak and lacks consistency. Five out of eight cases are inconsistent with the statement it makes concerning them. See "Supplemental Brief," No. 16, lower half of page 13 and page 14, where this subject is analyzed.

(2) We are not concerned with an appeal from a denial of a petition for rehearing, but with an appeal from the original order.

(3) This court in *Wayne v. Owens-Illinois*, 1937, 300 U. S. 131, 133, especially cited it in No. 2, as being indecisive and adhered to the two decisive decisions of (1) *West v. McLaughlin*, CCA 6, 1908, (discussed in the "Supplemental Brief" at page 52, number 64, and (2) *Cameron v. National*, CCA 8, 1921, 272 Fed. 874 (discussed in the "Supplemental Brief" at page 10, number 11).

(4) The *Conboy* decision is 36 years old, and this court has cited it only four times in cases heard by it and has never followed it.

The *first time* the *Conboy* decision was cited: *Harrison v. Magoon*, 1907, 205 U. S. 501. The *Conboy* case grew out of bankruptcy. This *Harrison* case involved (1) a judgment of a Hawaiian territorial court and (2) the applicability of an Act relating to appeals from that territory which was enacted after the original judgment was rendered. The opinion at page 503 remarked: "No doubt the decisions cited and others show that **where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error or appeal does not begin to run until the petition for rehearing is disposed of.**" It was held that the territorial judgment act not being existent when the original judgment was rendered a petition for rehearing could not make such a subsequent act applicable. In passing the opinion observed that the general rule had been limited as to bankruptcy cases by the *Conboy* decision. This court expressly made it apply to bankruptcy law in *Wayne v. Owens-Illinois*, 300 U. S. 131. See Supplemental brief, page 46, case number 62.

The *second time* the *Conboy* decision was cited: *Old Nick v. U. S.*, 1910, 215 U. S. 541. Verdict and judgment in federal court for violation of alcohol tax, motion to vacate and for new trial overruled. Writ of error not issued within six months as required by statute, whereupon the court entered an order reciting that a writ of error was "issued and served *nunc pro tunc* as within" the statutory six months. This court held that a mere *nunc pro tunc* order did not cure non-compliance. Again the opinion remarked, *obiter dicta*, that in bankruptcy a petition for rehearing filed after time for appeal did not save the appeal which was held otherwise in *Wayne v. Owens-Illinois*, as stated above.

The *third time* the *Conboy* decision was cited: *Zimmern v. U. S.*, 1936, 298 U. S. 167. Suit to set aside deed and to

make real estate subject to income tax. The judgment court extended the term to allow time for modifying its judgment. This court held that the court had control over its judgment within the extended term and reversed the appellate court for dismissing the appeal. The opinion merely remarked, as an aside, that a petition for rehearing was filed "when the time for appeal had already gone by if the original decision was then presently in force. Cf. *Conboy v. First Nat. Bank*, 203 U. S. 141, 145."

The fourth time the *Conboy* decision was cited: *Wayne v. Owens-Illinois*, 300 U. S. 131, 133, note 2: "This court had averted to the question without deciding it," (citing the *Conboy* decision), and then proceeded to "decide it" adversely to *Conboy*.

It is of importance to note that in contrast to the *Conboy* decision of thirty-six years ago which has never been followed by this court in any case heard by it, the *Wayne v. Owens-Illinois* decision decided five years ago has been followed without question by the lower federal courts. Shepard's Citations contains more than 40 lower federal court references to it.

Respondents' Brief page 44.

Wayne v. Owens-Illinois, 300 U. S. 131. This decision has been discussed at No. 62, page 48 of "Supplemental Brief" herein.

Respondents' Brief page 44.

Bowman v. Lopereno, 1940, 311 U. S. 262. It is sufficient to refer to the quotation from page 266 of the opinion which is quoted at No. 8A, page 8 of the "Supplemental Brief," namely: "Treating . . . The petition of No-

vember 15, 1937, as a *second petition for rehearing FILED OUT OF TIME*" . . . "These circumstances enlarged the time for taking appeal" . . .

Respondents' Brief page 45.

Gypsy v. Escoe, 1927, 275 U. S. 498.

It is true that a petition for rehearing was filed within time (three months) for applying for certiorari and denied, within time, on June 14. But as the court said, "On September 30, 1927, **more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.**"

It is true that on June 18, still within time, an application for **leave to file** a second petition for rehearing was filed, and later, denied after time. But an application for **leave to file** an application for rehearing **is not the filing of a petition for rehearing** and does not have the effect of one. This court said that "the mere presentation of a motion **for leave to file**" does not have the effect of suspending the time for seeking a review.

This court went on to suggest to the petitioner how, within the applicable long established rule of law, another application for certiorari could be seasonably filed. It said that if **leave to file a second petition for rehearing** was granted and the petition was actually entertained, "then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition" for rehearing.

This court was but repeating the distinction it had already clearly explained in *Morse v. United States*, 1926, 270 U. S. 151, at page 153, as noted in petitioner's "Supplemental Brief," No. 35, page 29, at page 30, last paragraph, in the discussion of that opinion. The quotation on the point is at the top of page 30 of the supplemental brief.

Where a court actually entertains a petition for rehearing without expressly granting leave to file such leave is conclusively presumed. See *Aspen v. Billings*, 1893, 15 U. S. 31, quoted in this point in the discussion of the case in petitioner's "Supplemental Brief," No. 4, page 3, at the top of page 5. Counsel does not have access to the official paging of the decision but it is at 37 L. Ed., page 988, lower half of second column preceding paragraph numbered 3. See also *Kingman v. Western*, 1898, 170 U. S. 675 at page 678. The applicable quotation on this point is copied into the discussion of the case in petitioner's "Supplemental Brief at number 29, page 23, in the middle of the larger quotation in the middle of page 24.

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Morse v. United States (1926), 270 U. S. 151, discussed at No. 35, page 29 of "Supplemental Brief" herein. This case distinguished between a *petition for rehearing* and a *motion for leave to file* a petition for rehearing, exactly as did *Gypsy v. Escoe*. In the *Morse* case this court carefully explained that the long established rule that a petition for rehearing of an order suspended the finality of that order for the purposes of appeal was not affected by holding that a motion for leave to file a petition for rehearing did not have the same effect. In its discussion this court referred to the cases cited on the upper part of page 46 by respondents' brief. All these cases are discussed in the "Supplemental Brief" herein as follows: (They are in the order as they appear in respondents' brief.)

Andrews v. Virginian, 248 U. S. 272, No. 3, page 3;

Aspen v. Billings, 150 U. S. 31, No. 4, page 3;

Chicago v. Basham, 249 U. S. 164, No. 13, page 11;

Kingman v. Western, 170 U. S. 675, No. 30, page 24;

Memphis v. Brown, 94 U. S. (4 Otto) 715, No. 32, page 26;

Texas v. Murphy, 111 U. S. 488, No. 52, page 39;

United States v. Ellicott, 223 U. S. 524, No. 56, page 42;

Washington v. Bradley, 19 L. Ed. 894, No. 61, page 46;

Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251, No. 10, page 9;

Respondents' Brief Pages 46 and 47.

Chapman v. Federal, CCA 6 (1941), 117 Fed. (2d) 321.

It is evident that the author of respondents' brief has misread the facts in this case so they will be related. The farmer debtor died leaving as heirs her two sons and her surviving spouse, their father, who was appointed administrator. The constitutionality of the provision of Section 75(r) that the term "farmer" . . . "includes the personal representative of a deceased farmer" has not been determined by this court. Consequently two farmer debtor petitions were contemporaneously filed, one by the administrator, and another by the heirs, the administrator being himself the sole petitioner in one case and joining individually with his two sons in the other. Creditors attacked both petitions for "lack of good faith" and "impossibility of rehabilitation" and the District Court dismissed both cases.

As the constitutionality of the provision of Section 75(r) giving the administrator the right to file as a farmer debtor had not been attacked in the district court that subject was deemed waived and only the dismissal of the administrator's proceeding was appealed. After the appeal was briefed by the appellant this court decided *John Hancock v. Bartels*, 308 U. S. 180, holding that farmer debtor pro-

ceedings may not be dismissed for "lack of good faith" or "impossibility of rehabilitation" thus leaving the dismissal by the District Court without a leg to stand on. The appellee obtained an extension of time to plead and, abandoning every argument previously advanced, attacked the appeal upon the sole ground that a farmer debtor proceeding by an administrator is unconstitutional and moved for dismissal of the appeal.

The appellant countered by obtaining leave to go back into the district court to file a petition for rehearing upon the basis of the *Bartels* decision. In the district court petitions for rehearing were then filed in both cases. Both were denied whereupon the heirs' case was also appealed making two pending appeals which were consolidated.

The appellate court held the administrator's proceeding was rightly brought under Section 75(r), thus leaving the heirs' case of no moment whatever except as an encumbrance on the docket. The opinion was by a new judge just appointed. One judge died prior to the decision and did not participate in it. The third judge took occasion to "concur in the opinion". The opinion as to the heirs' proceeding relied upon *Mintz v. Lester*, CCA 10, 1938, 95 Fed. (2d) 590, (discussed hereafter at page 38 of this reply brief) where the appeal was from the dismissal of a **petition for rehearing**, and other similar weak appellate decisions. It quoted (at page 324) from *Conboy v. First National Bank* (1906), 203 U. S. 141, as follows. Page 324: "No appeal lies from orders denying petitions for rehearing". It held that the heirs' petition for rehearing was not "seasonably" filed (having been filed after seven months).

The petitions for rehearing in this pending *Pfister* case were filed within two weeks and five weeks respectively, both being filed shortly after counsel discovered what had

occurred. R. 9, entry of August 13. R. 10 entries of September 7 and 16. R. 11 entry of September 20. R. 27 to 34. R. 34 to 35. R. 89 and 90, paragraphs 2 and 3. R. 144, paragraphs 7, 8 and 9. R. 146, bottom of page and top of R. 147.

The significance of *Chapman v. Federal*, CCA 6, 1941; 117 Fed. (2d) 321, is the following quotation from it: "But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the appeal runs from the date thereof" citing *Wayne v. Owens-Illinois*, 300 U. S. 131; *Voorhees v. John T. Noye*, 151 U. S. 131; *Gypsy v. Escoe*, 275 U. S. 498. Thus putting the Chapman heirs' decision solely on its interpretation of "seasonable" and "entertain" and "consideration on the merits". In this pending *Pfister* case the conciliation commissioner himself denied motions to dismiss the petitions for rehearing and therefore "entertained" them and reported that he fully considered the "entire proceeding". See petitioner's brief, page 9, "Petitions for Rehearing and Their Denial."

The Chapman opinion lends no aid to the respondents' argument. The facts and the procedure differ widely from the present pending case.

The List of Cases Cited by Respondents' Brief But not discussed, at page 47.

Chicago M. & St. P. R. R. Co. v. Leverenz (1927), (CCA 8), 19 Fed. (2d) 915;

McIntosh v. U. S. (1934), CCA 4, 70 Fed. (2d) 507;

Northwestern, etc. v. Pfeifer, (1929), CCA 8, 36 Fed. (2d) 5;

Larkin Packing Co. v. Hinderliter (1932), CCA 10, 60 Fed. (2d) 491.

These four cases will be discussed in one group.

They were not bankruptcy cases but civil suits. In the first three cases time for filing error was three months. In each of these three cases a motion for new trial was filed within term but after three months and denied. Consequently each writ of error or appeal was taken more than three months thereafter.

The court in each of the three decisions held that if an application for a new trial or for rehearing is not filed within the period for seeking a review, it is lost. This was expressly disapproved and repudiated by this court in *Wayne v. Owens-Illinois*, 1936, 300 U. S. 131, at 137, saying "courts of law and equity have such power, limited by the expiration of the term at which the judgment or decision was entered and not by the period allowed for appeal, or by the fact that an appeal has been perfected," citing in Notes 9 and 8 some of the decisions of this court already relied upon by the petitioner. This decision, when rendered was with the minority, and is utterly repudiated.

The fourth case, *Larken v. Hinderliter*, CCA 10, 1932, 60 Fed. (2d) 491, was slightly different but sympathetic with the other three. Appeal time was thirty days and the court held that an informal application for a slight correction of a judgment was not an application for rehearing.

Clarke v. Hot Springs, CCA 10, 1935, 76 Fed. (2d) 918.

This is an obiter dicta opinion that a petition for rehearing to be seasonable must be filed "within the time for

appeal". The court held in *Wayne v. Owens-Illinois*, 300 U. S. 131, 137 that the power of a court to entertain a petition for rehearing "is limited by the expiration of the term . . . and **not by the period allowed for appeal**". This court there further held that in bankruptcy there are no terms and therefore that right is not limited by the expiration of the term. The appellate court in the *Clarke v. Hot Springs* case did not dismiss the appeals—there were four of them which they decided on the merits.

Mintz v. Lester, CCA 10, 1938, 95 Fed. (2d) 590. This decision accords with the universal rule that the denial of an application for rehearing is discretionary and not appealable. Appellant Mintz appealed from an order "denying her motion for a rehearing." The motion for rehearing was denied May 20; the appeal was from that order and no other. The last sentence of the opinion is: "It follows that the appeal was improvidently granted and it is therefore dismissed. The distinction was clearly and concisely worded in *In re Jayrose*, CCA 2, 1937, 93 Fed. 471, quoted in "Supplemental Brief," number 28 at pages 22 and 23, and cited in the petition at page 40 as one of the Circuit decisions with which the decision below is in conflict.

International v. Cary, CCA 6, 1917, 240 Fed. 101. This Sixth Circuit decision is sandwiched between its prior decision in *West v. McLaughlin*, CCA 6, 1908, 162 Fed. 124, 125, and its later decision in *Miller v. Hatfield*, CCA 6, 1940, 111 Fed. (2d) 28 at 32, both holding that a petition for review may be filed after the period fixed by rule of court. This decision was distinguished by the Sixth Circuit in *Miller v. Hatfield* at page 33, saying "This conclusion is not in conflict with *International Agr. Corp. v. Cary*, *supra*." This is true because the original order had already been considered on a petition for review and re-

versed. Two years later another petition for review was filed and dismissed.

In re Albert; Brooklyn v. Albert, CCA 2, 1941, 122 Fed. (2d) 393. This is one of the decisions cited as showing that the decision below is in conflict with that of other circuits. Petition page 19 "In the Second Circuit", it holds that Section 39 is not a statute of limitation, and does not limit Section 2 (10) and also that "The jurisdiction of the bankruptcy court when invoked by the filing of the petition continues until the estate is closed." It upholds the contention of the petition for certiorari.

In re David (1929), CCA 3, 33 Fed. (2d) 748, has already been discussed at page 28 of this reply brief.

In re Wister (1916), CCA 3, 237 Fed. 793. This case has also been discussed previously in this reply brief at page 27.

Reply to Respondents' Brief Pages 48 to 54.

(Under Headings:

Page 48: "III. Petition for rehearing have been filed merely for the purpose of attempting to revive and extend the right to review, District Court correctly dismissed such petitions for review."

Page 49: "IV. Order of September 7, 1940, are consent orders. No appeal or review thereof by petition for review can be had therefrom."

Page 54: "V. Order of August 13, 1940 is a consent order. No appeal or review by petition for review can be had thereunder.")

The foregoing matters are repetitions of preceding parts of the respondents' brief and this reply brief will not go over them again. Nearly all of the cases cited were cited once or several times before and were replied to in this reply brief.

Clemens v. Gregg (California), 1917, 167 Pac. 294. After acting upon a consent decree in the settlement of a foreclosure action by making payments for four years one party objected. It was held the consent decree had been fully ratified.

Respectfully submitted,

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Lima, Ohio
October 13, 1942.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

HENRY ANTON PFISTER,

Petitioner,

vs.

**NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HARTMAN AND
SON, E. C. HOOK, AND EMIL GEEST,**

Respondents.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSING BRIEF OF RESPONDENTS.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1941

NO. 958-959

HENRY ANTON PFISTER,

Petitioner,

vs.

**NORTHERN ILLINOIS FINANCE CORPORATION,
ALGONQUIN STATE BANK, HARTMAN AND
SON, E. C. HOOK, AND EMIL GEEST,**

Respondents.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSING BRIEF OF RESPONDENTS.

I.

OFFICIAL REPORT OF OPINION.

The opinion sought to be reviewed in this case is *Anton Pfister v. Northern Illinois Finance Corporation, Algonquin State Bank, Hartman and Son, E. C. Hook, and Emil Geest*, (CCA 7) reported 123 Federal 2d 543, decided November 10, 1941 (Tr. 209-215 inclusive).

II.

**NO SPECIAL OR IMPORTANT REASONS EXIST FOR
GRANTING WRIT OF CERTIORARI IN THIS CASE.**

The petition contains no special or important reasons for the granting of a review on Writ of Certiorari as re-

quired by rule 38A, paragraph 5, of this Court. This is not a decision of a State court. The opinion of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals on the same matter. The Circuit Court of Appeals did not decide an important question of local law which might conflict with applicable local decisions. It did not decide an important question of federal law which has not already been decided. It did not decide a federal question in conflict with the applicable decisions of this court. It did not depart from the usual course of jurisdictional proceedings, nor has it by its decision sanctioned any departure by any other local court which would call for the exercise of this court's power of supervision.

The decision of the Circuit Court of Appeals is in direct conformity with numerous decisions of this court and the respective Circuit Courts of Appeal as follows:

1. *Conboy v. First National Bank*, 203 U. S. 141, 51 L. ed. 128.
2. *C. M. & St. P. R. R. Co. v. Leverentz*, 19 F. 2d 915.
3. *Chapman v. Federal Land Bank*, 117 F. 2d 321.
4. *McIntosh v. U. S.*, 70 F. 2d 507.
5. *Clark v. Hot Springs Electric Light & Power Co.*, 76 F. 2d 918.
6. *N. W. Public Service Co. v. Pfeifer*, 36 F. 2d 5.
7. *Larkin Packing Co. v. Henderliter*, 60 F. 2d 491.
8. *Minz v. Lester*, 95 F. 2d 591.
9. *International Agricultural Corp. v. Cary*, 240 Fed. 101.
10. *In re David*, 33 Fed. 2d 748.
11. *In re Albert*, 122 Fed. (2d) 393.
12. *In re Miller (Miller v. Hatfield)* 111 Fed. (2d) 28 @ 32.
13. *In re Wister & Co.*, 237 Fed. 793.

III.**CONCISE STATEMENT OF FACTS.**

The petitioner has sought to make the simple issues of this case complex. Petitioner has sought in his statement of the matters involved and the questions presented to confuse the material issues in this case by inserting immaterial matters into his statement of facts and arguments in his brief. To clarify the issues we are submitting the following statement as the pertinent facts:

We submit that the opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 209-215 inclusive) contains a concise and complete statement of the material facts necessary for the determination of the petition for writ of certiorari. We repeat in substance such statement of facts with references to the record.

On February 28, 1940, petitioner filed his petition as a farmer debtor under Section 75 of the Bankruptcy Act. His creditors did not accept his proposal and the debtor then filed, on July 19, 1940, his amended petition under Section 75 (s), through R. E. Coulson and J. E. Dazey, his attorneys (R. 25). This amended petition was referred to the Conciliation Commissioner on July 20, 1940, who thereafter acted as Referee under Sub-section (s) (4).

1. The Four Orders Complained of.

The Referee entered four orders; one on August 13, 1940, and three on September 7, 1940. The order of August 13, 1940 fixed the rental and principal payments to be made by the debtor (R. 72). The orders of September 7, 1940 related to the sale of what was termed perishable property (R. 77, 80, 82). The farmer debtor did not appeal or file a petition for review from any of these

orders within the ten-day period required by Section 39C of the Bankruptcy Act, 11 USCA, Section 67. No request for an extension of this ten-day period was ever made by farmer debtor pursuant to the provisions of said Act. The farmer debtor's failure to file such petitions caused these orders of August 13, 1940, and of September 7, 1940, to become final at the expiration of such ten day periods. After such ten day period and after such orders had become final, petitioner filed with the Referee his two petitions for rehearing. The petition for rehearing of the order of August 13, 1940 was filed September 16, 1940 (R. 139). The petition for rehearing of the orders of September 7, 1940, was filed September 29, 1940 (R. 88). On September 30, 1940, the referee denied the petition for rehearing of the orders of September 7, 1940 (R. 109) and on November 28, 1940, the Referee denied the petition for rehearing of the order of August 13, 1940 (R. 150). The petitioner then for the first time on October 9, 1940, filed his petition for review of the three orders of September 7, 1940 (R. 116). On November 28, 1940, he filed for the first time his petition for review of the order of August 13, 1940 (R. 165). Said petitions for review so filed were dismissed by the District Court on December 16, 1940, on the ground that it did not have jurisdiction to hear said petitions (R. 176). On December 30, 1940, the debtor filed his motion in the District Court to vacate the orders of December 16, 1940. This motion to vacate was based on the cases of *Bowman v. Lopereno*, 311 U. S. 262, and *Wright v. Union Central Life Insurance*, 85 L. ed. 166 (R. 178). This motion was denied by the District Court on January 14, 1941 (R. 179), Judge Holly stating that he had re-examined the opinion in the *Bowman* case and was of the opinion that the orders heretofore entered by him should stand. From the orders of the District Court of December 16, 1940, dismissing the respective petitions for review of the order

of August 13, 1940 and the orders of September 7, 1940, and the order of the District Court entered January 14, 1941, denying a reconsideration of the December 16th orders, petitioner took an appeal to the Circuit Court of Appeals of the Seventh Circuit where the orders of the District Court were affirmed (R. 179-180).

2. Two Separate Cases Involved.

There are actually two cases involved; one, the order of the District Court dismissing the petition for review of the order of August 13, 1940, being 7th CCA No. 7632, and the other, involving a similar order of the same court dismissing the petition for review of the three orders entered on September 7, 1940, being 7th CCA No. 7631. These two cases were consolidated in the Circuit Court of Appeals for hearing on appeal.

3. Issues Involved.

Simply stated, the only issue involved is whether or not the petitions for review were filed in apt time. It is therefore apparent that this matter involves one of procedure only.

Petitioner, however, in his statement of the case and brief, attempts to give a background of the circumstances surrounding the entry of the original orders of August 13, 1940 and September 7, 1940. The statements made by the petitioner's counsel in many instances are inflammatory, misleading, inaccurate and prejudicial and present a biased and unfair background on many matters immaterial to this issue and are not borne out by the record.

4. Order of August 13, 1940 (CCA No. 7632).

To illustrate, he contends, with reference to the order of August 13, 1940, (1) that the order was entered with-

out notice; (2) that the rental therein found was prohibitive; and (3) that the date of the moratorium is erroneous. None of these objections are germane to issues in this case, as will be hereinafter pointed out; nevertheless, we think the following factual background should be stated:

As to the first objection, the transcript in fact shows that a motion was filed by debtor himself for the fixing of such rental and was set for hearing by his own motion on August 13, 1940 (R. 8). Furthermore, at the hearing on August 13, 1940, the debtor, through his counsel, joined the creditors in asking that the rental be fixed (R. 113).

As to the second objection, the amount of the rental fixed by the order, the record in fact shows that the rental as fixed was an amount less than the maximum figure suggested as rental and principal payments by the debtor, through his counsel, Robert E. Coulson (R. 159-162 inclusive). It is difficult to conceive how the farmer debtor under such circumstances can complain.

As to the third objection to this order, the record in fact shows that the debtor in his own petition stated:

"That your petitioner's moratorium began running on, to-wit: the 26th day of April, A. D. 1941, and said first year of said moratorium will expire on, to-wit: the 26th day of April, A. D., 1941" (R. 68).

The Referee followed this suggestion in fixing the stay period, and the error, if any, was therefore induced by the farmer debtor himself and his counsel. They are in no position to criticize the Referee in following their own suggestion.

5. Orders of September 7th (CCA No. 7631).

The orders of September 7th came on for hearing, pursuant to notice and order of court, on debtor's own motion, on August 13, 1940. On this day, the Three Credi-

tors offered witnesses to prove that the personal property in question was perishable within the meaning of the Act. After such witnesses were sworn, but before any evidence was given by them, debtor's counsel stated that such testimony was not necessary (R. 111). Thereupon said witnesses were withdrawn and the following stipulation was made of record:

"Hearing on Reclamation Petition and stipulations by the debtor and each of the following claimants: Hartman and Son, Northern Illinois Finance Company, and Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of Paragraph 2, Sub-section (s) of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by the debtor as exempted property" (R. 10).

This matter was then continued to August 30, 1940, and on August 30 was again continued to September 7, 1940 (R. 10). On September 7, 1940, (25 days after such hearing), further hearing was had on said petition and the orders pursuant to the stipulations were entered (R. 77, 80, 82). At this hearing of September 7, 1940, farmer debtor was present in person (R. 113, para. 7) and was represented by two lawyers, Robert E. Coulson and U. G. Ward (R. 111). At that hearing, debtor was given a full opportunity to indicate his position before the entry of these orders. No proof was offered on the question of the sale of personal property nor was a request for time to put in additional proof asked for (Rec. 111). These orders were thereupon signed by the Referee in the presence of the farmer debtor and his two counsel (R. 113, para. 7).

6. Debtor's and Attorneys' Appearances Before Referee.

In all the proceedings before the Referee, from the first meeting of creditors on June 28, 1940 to and including the hearing of September 7, 1940, debtor was represented by Robert E. Coulson, his attorney. Mr. Dazey never appeared at any time (R. 109). During all of the hearings in this proceeding, debtor attended only two. The Referee on numerous occasions requested that the debtor and J. E. Dazey be present. Although in Dazey's affidavit, he alleges he suffered the illness on May 21st, 1940, more than a month before the first meeting of creditors, yet the Referee and the other parties to the proceedings were never notified of such alleged illness, and such illness was first claimed in the petition for rehearing filed September 20, 1940 (R. 114-115). The Circuit Court of Appeals found these facts to be true (R. 213-214).

It is evident that throughout the proceedings, the farmer debtor took no real interest in the proceedings, and his petitions for rehearing were not filed in good faith but "merely for the purpose of reviving and extending the time for filing a petition for review." (See CCA opinion, R. 213-214.)

Throughout petitioner's petition, his counsel has taken the liberty of misrepresenting statements of fact which are not borne out by the record. For example, at pages 33, 35, and 53 of his brief filed in this court, appear self-serving statements intended to give the impression that the orders of September 7th were not actually entered at such time. No references to the record bearing out these statements are made. As above stated, the record emphatically shows that these orders were entered and signed by the Referee on the date of their entry in the presence of the farmer debtor and his two counsel (R. 113-114). Many other misstatements of fact appear in the petition, but an enumeration of the same will serve no useful purpose.

IV.

ARGUMENT.

The decisions of the District Court and the Circuit Court of Appeals for the Seventh Circuit are manifestly correct, and follow a long line of decisions of this court and the several Circuit Courts of Appeal.

The petitioner in his petition and supporting brief has set out fifteen questions presented (his brief 10-13 inclusive) and has set out sixteen reasons why the writ for certiorari should be allowed (his brief 14-25 inclusive).

Many of the so-called questions presented and reasons for granting such a writ are repetitions and many are not applicable to this case. In lieu of these, we submit that the only questions presented to the District Court and the Circuit Court of Appeals were the following:

1. Did the orders complained of, viz: the orders of August 13, 1940 for fixing the rental, and the three orders of September 7, 1940 on the sale of the personal property, become final at the expiration of ten days from the entry thereof when no petitions for review of such orders were filed within ten days of the entry as provided by Section 39C of the Bankruptcy Act?
2. Did the petitions for rehearing of the orders of August 13, and the three orders of September 7, 1940, filed after the ten-day period for the filing of petitions for review under Section 39C of the Bankruptcy Act, have the effect (notwithstanding such petitions were denied) of lifting the bar of Section 39C which had already fallen, and did they have the effect of destroying the finality of those orders and create a new ten-day period for filing petitions for

review starting from the date of the denial of such petitions for rehearing?

3. Were the petitions for rehearing filed merely for the purpose of reviving and extending the time for filing the petitions for review?
4. The three orders of September 7, 1940 being consent orders, can such orders be appealed from or reviewed by petitions for review?

1.

The petitioner in the Circuit Court of Appeals made the following contentions:

1. That Section 75 (s) of the Bankruptcy Act and not Section 39C of such Act governs the time for filing petitions for review from the orders of the Referee in former debtor cases.
2. Even if the time for filing petitions for review in such cases are governed by Section 39C of the Bankruptcy Act, the petitions for review were filed in time, because the petitions for rehearing although filed after the ten day period provided by Section 39C of the Act, had the effect (although such petitions were denied) of lifting the bar of Section 39C which had already fallen.

These were the only contentions made by the petitioner in the Circuit Court of Appeals with reference to the above mentioned issues. No other or different contentions can now be made in his petition for writ of certiorari. *Sonzinsky v. U. S.*, 300 U. S. 506, 81 L. Ed., 772.

The authorities sustain the holding of the Circuit Court of Appeals that the petitioner's contentions were without merit.

It is readily apparent from a consideration of the pertinent statutes and the rules of the Supreme Court that the Circuit Court of Appeals was correct in holding that Section 39C and not Section 75 (s) governed the time for filing petitions for review (R. 209-212).

With the issue thus defined and established, we wish to refer to the quotation from Section 75 (s) in petitioner's brief (page 14). You will there note that that limitation is to objections, exceptions and appeals solely. No reference is made therein to petitions for review of referee's orders.

A reading of the section from which petitioner quotes shows that that section deals solely with appraisals and after pointing out the procedure on appraisals and the manner of appointment of appraisers, says:

"Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

To further demonstrate that this section refers strictly to appraisals is the limitation that "either party may file objections, exceptions, and take appeals *within four months after the date the referee approved the appraisal.*"

Supposing these orders had been entered four months and one day after the referee had approved the appraisals. Would petitioner agree and would the court then hold that all right of review had been lost? This is too fallacious to warrant further discussion.

The purport of Section 75 of the Act cannot be clearly ascertained without a study of the Act itself and the general orders of the Supreme Court enacted thereon. A reading of both the Act itself and of the general orders of the United States Supreme Court make it clearly apparent that neither Congress nor the Supreme Court ever intended that Section 75 should contain all procedural limitations on matters arising under the act. In fact, in the quotation contained in petitioner's brief there is no limitation on petitions for review of referee's orders. The Supreme Court of the United States, under General Order L, Paragraph 11, appraised the incompleteness of this section when it adopted the following rule:

"In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section."

Congress itself in the act clearly signified that this section was not sufficient unto itself in procedural matters. It clearly manifested its intention that this act was to be administered in accordance with general bankruptcy procedure except as this section expressly provided to the contrary when it inserted the following language in paragraph 75 N:

"In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when

the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner, for the purpose of forwarding same to the clerk of court."

If this leaves any doubt as to the intention of Congress and the applicability of section 39C of the Bankruptcy Act in the Court's mind, we will call the following to the Court's attention.

The record in this case shows (R. 8) that farmer debtor on July 23, 1940 prior to the entry of the orders in question, amended his petition, asked to be adjudged a bankrupt under section 75 (s) and was on said date, viz., July 23, 1940, duly adjudicated a bankrupt.

The Act itself provides (75 (s) (4)) that after such adjudication the Commissioner shall continue to act and he shall then act as a referee and not as Commissioner:

"The conciliation commissioner, appointed under sub-section (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of sub-section (s) of section 75 of this Act; and continue so to act until the case has been finally disposed of."

Under the above provision of the Act, it is clear that Mr. Givler was on the date of the signing the respective orders acting as a referee; that his powers and duties, powers and the rights and liabilities of the parties to this record, whereas pointed out in Section 75 (n) on such dates the same as if farmer debtor had filed a voluntary petition in bankruptcy. Under General Order L, Givler's powers and duties were those of a referee in bankruptcy.

This being all true and section 75 carrying no inconsistent provision, section 39C of the Chandler Act must

necessarily apply as to the date of the filing of petitions for review of referee's orders.

To hold that it did not and that section 75 was sufficient unto itself in this regard would be contrary to Congressional intention, and United States Supreme Court interpretation as shown above, and last but just as important to common sense, it would make all orders entered subsequent to four months of the approval of the appraisal final and impregnable to review, appeal or reconsideration.

The case of "*Sampayo v. Bank*, reported as *Benitez v. Bank of Nova Scotia*, 61 Supreme Court Reporter 953" cited by the farmer debtor states no difference or other rule. The only question presented to the court in that case was whether the definition of a farmer as set forth in section 75 (r) should govern in farmer debtor proceedings, or whether the definition of farmer appearing in Section 1; and (17) of the Chandler Act should control. The court simply held that the provision in Section 75 should apply since it is not changed by the revision, but the court clearly indicated that the very purpose of the Chandler Act was to make a comprehensive and careful revision of the bankruptcy law and applied generally to all proceedings thereunder.

There is no question that the limitation provided by Section 39C for the filing of petitions for review is mandatory and has the force of law and must be complied with in order to perfect a petition for review. This is borne out clearly in the case of *In re David*, Third Circuit, 33 Fed. 2nd, 748, where it appears that at the time of such decision there was a rule of the court which required that all petitions for review of an order of a Referee in a bankruptcy case must be filed within ten days after such order; (this in substance is the same as the present Section 39C of the Bankruptcy Act); and in holding that the

time specified by such rule is mandatory, the court said at page 749:

"Long practice under this rule and like rules of other courts has demonstrated that the time is reasonable. Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the District Court is exclusive. *In re Greek Mfg. Co.* (D. C.) 164 F. 211; *In re Marks* (D. C.) 171 F. 281.

"The petitions are dismissed."

This case, *In re David*, aforesaid; was cited with approval and upheld (contrary to petitioner's argument and contentions) in *In re Miller*, *Miller v. Hatfield*, 111 Fed. 2nd, 28, at 34. We would also like to point out that the *Miller* case last mentioned involved a farmer-debtor proceeding under Section 75:

Petitioner in his brief has cited various Sections of the Bankruptcy Act and has, in his brief, inserted isolated sentences from various Federal Courts. With his several citations as quoted, we have no argument, but he has isolated various statements of the courts which, if read with the balance of the decision, will not bear out the contention he makes, and the cases themselves, when the entire decision is read, support the contentions of the respondents herein. We will not attempt to analyze all of these decisions. We have hereinabove set forth the true and correct rule of law.

2.

Having set forth above that these orders became final on the 10th day after their entry, the remaining proposition is, was the finality of these orders destroyed by the subsequent filing of the untimely petitions for rehearing, which were not entertained, but denied, by the court?

The Circuit Court of Appeals and the District Court properly held that the petitions for rehearing did not revive or extend the time for filing petitions for review. These conclusions are sustained by the following authorities:

1. *Conboy v. First National Bank*, 203 U. S. 141, 51 L. ed. 128.
2. *C. M. & St. P. R. R. Co. v. Leverentz*, 19 F. 2d 915.
3. *Chapman v. Federal Land Bank*, 117 F. 2d 321.
4. *McIntosh v. U. S.*, 70 F. 2d 507.
5. *Clark v. Hot Springs Electric Light & Power Co.*, 76 F. 2d, 918.
6. *N. W. Public Service Co. v. Pfeifer*, 36 F. 2d 5.
7. *Larkin Packing Co. v. Henderliter*, 60 F. 2d 491.
8. *Minz v. Lester*, 95 F. 2d 591.
9. *International Agriculture Corp. v. Cary*, 240 Fed. 101.
10. *In re David*, 33 Fed. 2d 748.
11. *In re Albert*, 122 Fed. (2d) 393.
12. *In re Miller (Miller v. Hatfield)* 111 Fed. (2d) 28 @ 32.
13. *In re Wister & Co.*, 237 Fed. 793.

The leading case and conclusive of the question presented is *Conboy v. First National Bank*, 203 U. S. 141. This case has not been modified or departed from and com-

pletely sustains the ruling of the District Court. The facts in this case closely parallel the facts in our case and are as follows:

The Referee allowed a claim on May 7, 1904 against the bankrupt's estate. After the District Court affirmed this order the Circuit Court of Appeals, on January 23, 1905, also affirmed the same order. The law then in effect required that appeals from decisions of the Circuit Court of Appeals allowing a claim had to be made within thirty days. After the thirty days had expired and on April 25, 1905, the trustee petitioned the Circuit Court of Appeals to recall its mandate and vacate the order of January 23, 1905, which application was denied. On May 8, 1905, a petition for rehearing of the same order was filed and denied by the court on May 17th and an order entered to that effect on May 24th. An appeal was taken from the order of January 23, 1905 of the Circuit Court of Appeals, also from the order denying the motion to recall the mandate and from the order denying the petition for rehearing and a reversal of such orders was prayed. The appeal was made four months after the order of January 23, 1905, had been entered and three months after the time for appeal from such order had expired. The Supreme Court held that although a petition for rehearing had been filed; since it was denied; it did not extend the time from which an appeal could be taken from the order in question and, in so holding, the Court said at page 130:

"But it is said that the limitation should be referred to the date of the order denying the petition for rehearing, and the trustee prayed an appeal from that order as well as from the judgment of January 23.

"No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett v. Brockett*, 2 How.

238, 17 L. ed. 251; *Wylie v. Coze*, 14 How. 1, 14 L. ed. 301. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

"The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. 'When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.' *Credit Co. v. Arkansas C. R. Co.*, 128 U. S. 258, 261, 32 L. ed. 448, 449, 9 Sup. Ct. Rep. 107, 108.

"In the circumstances, the suggestion that there is but one term of the circuit court of appeals for the second circuit, and that, by the rules of practice of that court, petitions for rehearing may be presented at any time during the term, and therefore that this petition operated to enlarge the limitation of the bankruptcy act, is without merit.

"The petition was denied. Whether it could have been granted in view of the terms and spirit of the bankruptcy act, or the effect, if it had been, we are not called upon to discuss.

"Appeal dismissed."

An examination of the report in the *Conboy* case will disclose that the following cases cited by the petitioner

in his brief in this case, to-wit; *Brockett v. Brockett*, 2 How. 238, 11 L. ed. 251; *Aspen v. Billings*, 150 U. S. 31; *Texas v. Murphy*, 111 U. S. 488; and *Kingman v. Western*, 170 U. S. 675, were also cited by the petitioner in the *Conboy* case, yet the Supreme Court by its decision in effect held that these decisions did not control since the petition for rehearing had been denied. This is practically conclusive against the persuasiveness of these cases cited by the petitioner.

Again, as in the *Conboy* case, 203 U. S. 141, the facts in the case of *Chapman v. Federal Land Bank*, 117 F. 2d 321, closely parallel those in our case and its ruling fully supports the District Court and Circuit Court of Appeals. From the report of this case it appears that Mr. Elmer McClain, one of petitioner's counsel, represented the petitioners in the *Chapman* case. Of special significance is this case because it is the latest case that we have been able to find on the subject where the facts are the same as in this case. It is apparent from the opinion in the *Chapman* case that Mr. McClain made the same contentions for the petitioner and there cited substantially the same cases as he does in this present appeal and the Circuit Court of Appeals discusses both the *Wayne v. Owens-Illinois*, 300 U. S. 131 and *Bowman v. Lapereno*, 311 U. S. 362, being two of the cases most relied on by petitioner here and refused to follow these two cases but quoted from and followed the *Conboy* case cited by us.

The facts in the *Chapman* case are as follows: Two farmer-debtors filed their petition under Section 75 of the Act. The petitions were amended to seek the benefits of Sub-Section "S" of Section 75, as was done by the farmer-debtor in this case. The Commissioner filed a report recommending the denial of relief to the debtors under Sub-Section "S". On July 29, 1939, the District Court overruled objections to the Commissioner's Report and

terminated the proceedings. The debtors took no steps to review the order of July 29, 1939, until February 28, 1940, when for the first time they filed in the District Court a petition for rehearing grounded on three recent decisions of the Supreme Court announced since the entry of the order of dismissal on July 29, 1939, which decision as a matter of substantive law showed that the court had erred in dismissing the petitions of the farmer-debtors. The District Court overruled the petitions for rehearing on June 19, 1940, having entered on May 29, 1940, a memorandum "petition for rehearing denied." The bankruptcy act then provided appeals had to be taken within thirty days after the entry of the order. No appeal was taken within the time provided from the order of July 29, 1939. The petition to rehear this order was filed after the expiration of the time for appeal just as in our case where the petitioner filed his petitions for rehearing after the time provided by Section 39C. The Court held that the petition for rehearing did not resurrect the right of appeal which had already expired and dismissed the appeal. In doing so, it said:

"(1) A petition for rehearing is addressed to the sound discretion of the court, and its denial is not the subject of appeal. *Roemer v. Bernheim* (*Roemer v. Neumann*), 132 U. S. 103, 10 S. Ct. 12, 33 L. ed. 277; *Harris v. Mills Novelty Co.*, 10 Cir. 106 F. 2d 976, 978; *Stradford v. Wagner*, 10 Cir., 64 F. 2d 749; *Mintz v. Lester*, *supra*.

"This has long been settled law. In *Conboy v. First National Bank of Jersey City*, 1906, 203 U. S. 141, 145, 27 S. Ct. 50, 52, 51 L. Ed. 128, a bankruptcy case, it was said: 'No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors.' The Supreme Court held that the right of appeal, lost by a failure

to make seasonable application for a rehearing within the thirty days allowed for appeal under an applicable general order, could not be restored by filing a petition for rehearing.

"Appellants contend that *Morse v. United States*, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518, supports their argument. We disagree; for Chief Justice Taft said (opinion, 270 U. S. 154, 46 S. Ct. 242): 'The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing.'

"Nor do we think that *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557, which recognizes the discretionary and nonappealable status of a motion for a rehearing, affords appellants any comfort. It was distinctly stated (opinion, 300 U. S. 137, 57 S. Ct. 385): 'A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuses to entertain it, does not extend the time for appeal.'

"(2) This language describes the plight of appellants in the instant case; for here the court did not grant a rehearing but 'overruled' the petition in a final order on June 19, 1940, after having entered on May 29, 1940, a signed memorandum: 'Petition for rehearing denied.'"

In *C. M. & St. P. Ry. Co. v. Leverenz*, 19 F. 2d 915, the court clearly points out that although a party may have a right to present a motion for a new trial after the time for appeal has gone by (which motion is in the nature of a petition for rehearing) yet where such motion is denied

and not granted, as was done in this case, the filing of such motion does not extend the time to appeal from the judgment in question. This is a leading case on this point and the Court said the following:

“Plaintiff claims that after the lapse of three months from the entry of judgment no writ of error could be sued out and that the judgment thereby became absolute and not subject to further control by the trial court.

“Defendant claims that throughout the term at which the judgment was entered and throughout any valid extension of that term, it was entitled to make a motion for a new trial; that such motion if made within the term mentioned was in time, that it tolled the judgment, and that the time within which to sue out a writ of error would not begin to run until decision on the motion for a new trial.

“There are two rules relating to practice equally well settled which must be considered: ‘(1) That the time limited by statute within which to sue out a writ of error is fixed and unchangeable and is not subject to control by the court or by consent of parties. *Veritas Oil Corporation v. McLain, et al.* (C.C.A.) 4 F. (2d) 389; *Camden Iron Works Co. v. City of Cincinnati* (C.C.A.) 241 F. 846; *Elliott Machine Corporation v. Vogt Bros. Mfg. Co.* (D.C.) 267 F. 934; *Old Nick Williams Co. v. United States*, 215 U. S. 541, 544, 545, 30 S. Ct. 221, 54 L. Ed. 318; *Brooks v. Norris*, 11 How. 204, 207, 208, 13 L. Ed. 665.

“There is one exception to this rule—that where a motion for a new trial is seasonably made, it tolls the statute, and for the purpose of appeal, the judgment does not become final until decision of the motion. *Kingman v. Western Mfg. Co.*, 170 U. S. 675,

678, 18 S. Ct. 786, 42 L. Ed. 1192; *Payne v. Garth* (C.C.A.) 285 F. 301, 308.

“(2) ‘That courts of the United States retain control over their judgments throughout the term at which they are entered. *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. Ed. 797; *U. S. v. Mayer*, 235 U. S. 55, 67, 35 S. Ct. 16, 69 L. Ed. 129; *Walker v. Moser* (C.C.A.) 117 F. 230, 232.

“When the time within which to sue out a writ of error was five years as provided in 1 Statutes at Large, c. 20, Sec. 22, p. 85, or two years, or one year, or six months, as it was by successive statutes, there was little danger of any conflict between these rules. A motion made within the term would also usually be within the five years or two years or one year or six months allowed for suing out a writ of error. When the court spoke of a motion being seasonably made it was usually made both within the term and also before the time had elapsed within which a writ of error might be sued out.

“With the time now reduced to three months within which to sue out a writ of error (43 Statutes at Large, c. 229, sec. 8, p. 940 (Comp. St. sec. 1126b)), there is abundant opportunity for trouble or misunderstanding with these rules.

“The true solution is to give effect to both rules.

(3) ‘If after the entry of judgment, the period of three months shall fully lapse without the making of any motion for the modification or control of the judgment, the right to review on writ of error has been lost. There is no tolling of the time within which to bring error, when the time has already fully expired. The intention cannot be that by lapse of time the judgment shall be proof against a writ of error today, but that next week or next month, by reason of some act

of the party complaining of the judgment, it may be brought back, as it were, to the status in which it was during the three months next after its entry. When the right to bring error is once lost it cannot be revived. *Conboy v. First National Bank*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. This case by analogy is quite persuasive. *Old Nick Williams Co. v. U. S.*, 215 U. S. 541, 544, 30 S. Ct. 221, 54 L. Ed. 318; *Brady v. Bernard & Kittinger* (C.C.A.) 170 F. 576; *Brady v. Bernard & Kittinger*, 217 U. S. 595, 30 S. Ct. 695, 54 L. Ed. 896; *Ewing v. Russell Hardware Co.* (C.C.A.) 295 F. 773, 776; *In re Steans & White Co.* (C.C.A.) 295 F. 833, 840.

"To have the right to sue out a writ of error and to extend the time therefor beyond the period of three months, the motion for a new trial must not only be made during the term, but it must be made during the three months next after the entry of the judgment and before the judgment becomes immune to a writ of error.

"Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. If the court shall deny the motion, there is no remedy. The privilege of presenting a motion for a new trial and of having it heard and determined on its merits even after the time within which to sue out a writ of error has expired, is a valuable right. There is no authority for denying it in this case. The motion for a new trial should therefore be considered on its merits."

"The writ of error must, for want of jurisdiction in this court, be and it is ordered dismissed."

To the same effect is the case of *Clark v. Hot Springs Electric Light & Power Co.*, 76 Fed. 2d 918, where it is said on page 921:

"The only power which the trial court had after the affirmance was to enforce the decree as affirmed; and to make an allowance for expenses. After a full hearing, it made such allowances on December 12, 1932. That order was appealable, but no appeal was taken within the statutory period. A petition for rehearing seasonably filed within the time for appeal will toll the time for appeal. But the petition was not filed within the time for appeal. A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term; even after the time for appeal has expired, the trial court may grant it, thus vacate the decree, and start again. But if the rehearing is denied, the original decree stands, and the right of appeal is not revived. All this has been carefully spelled out by the courts. *Larkin Packer Co. v. Hinderliter Tool Co.* (C.C.A. 10) 60 F. (2d) 491; *Northwestern Public Service Co. v. Pfeifer* (C.C.A. 8) 36 F. (2d) 5; *Chicago, M. & St. P. Ry. Co. v. Leverentz* (C.C.A. 8) 19 F. (2d) 915; *Conboy v. First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128."

In *McIntosh v. United States*, 70 F. 2d 507, the final decrees were entered on January 17, 1933. During the same term of court, but more than three months after the date of the final decree and on May 16, 1933, petitions for rehearing were filed and denied on May 29, 1933. The law effect at that time was that no appeals could be taken after the expiration of three months. The court held that the filing of the petition for rehearing more than three months after the entry of the final decree did not have the effect of lifting the bar of the statute which had already

fallen and had shut off the right of appeal. In so holding, the Court said:

"We do not think that the right of the court to modify judgments within the term means that the limitation prescribed by Congress in an effort to minimize the evils of the law's delays may be evaded by the simple expedient of filing a petition for rehearing after the right of appeal has been lost by delay. A petition for rehearing filed within the term, but after the right of appeal has been barred by statute, will authorize the court to deal with the decree as it sees fit; but it will not restore the right of appeal therefrom which has been lost. See *Conboy v. First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128."

In *Northwestern Public Service Co. v. Pfeifer*, 36 F. 2d 5, the rule in the *Leverentz* case was held to be the reasonable one. In accord also is *Larkin Packer Co. v. Hinderliter*, 60 F. 2d 491.

All of the cases cited by the petitioner are distinguishable either on the ground that the petitions for rehearing were granted, the old judgment vacated and set aside and a new judgment entered after a hearing on the merits, as illustrated by the *Wayne* case, or on the ground that the petitions for rehearing were filed within the time provided for appeal and the order complained of had never become final until the disposal of the motion or petition.

The cases of *Kingman v. Western*, 170 U. S. 675; *Texas v. Murphy*, 111 U. S. 488; *Aspen v. Billings*, 150 U. S. 31; *Carpenter v. Condor*, 105 F. 2d 318; *U. S. v. Ellicott*, 233 U. S. 524; *Citizens v. Opperman*, 249 U. S. 449, and *Brockett v. Brockett*, 43 U. S. (2 How.) 238 are distinguishable on the ground that the motions for new trial or the petitions for rehearing involved in these cases were filed within the appeal time or the court assume that they were so filed.

In *Bowman v. Lopereno*, 311 U. S. 262, cited by petitioner, the order complained of was the order of adjudication in bankruptcy. A petition for review within the required time was filed and certified to the District Court. No disposition of the petition for review was made and it remained in abeyance in the District Court until October 25, 1937, at which time the order of adjudication was confirmed. On November 15, 1937, being within the appeal time, the petition for rehearing was filed asking that the order of adjudication be vacated and set aside. On February 17, 1938, the petition for rehearing was heard and denied. The matter was then appealed to the Circuit Court of Appeals on March 18, 1938.

It will be observed from the foregoing facts that the *Bowman* case is not analogous in facts to the case at bar. In that case the petition for rehearing was filed within the time allowed for appeal. In the case at bar it was not.

The *Bowman* case was not decided until after the District Court entered its orders dismissing the petitions for review. Motions were made by the petitioner requesting Judge Holly to reconsider the matter. At that time the District Court requested that the respective parties furnish copies of the briefs filed in the *Bowman* case and, after considering the briefs, the court reaffirmed its original orders and denied the motions to reconsider. The petitioner's brief in the *Bowman* case specifically set forth that they were mindful of the rule that when preparing the petition for rehearing and the filing of the appeal that the right of appeal once lost could not be revived by petition or motion for rehearing.

Furthermore, in the later case of *Chapman v. Federal Land Bank*, 117 F. 2d 321, relied upon by us, where the facts are substantially the same as the facts in this case, the court clearly distinguished the *Bowman* case and,

although it commented upon language used in the *Bowman* case, followed the *Conboy* case cited by us.

In *Gypsy Oil Co. v. Escow*, 275 U. S. 498, cited by petitioner, the petition for rehearing was filed within the period within which an appeal could be allowed which is an exception to the general rule. As previously stated, this is not the situation in the case at bar.

In *Morris v. United States*, 270 U. S. 151, the only question involved was whether leave was obtained to file a motion for a new trial. The court held that the mere application for a new trial without the granting of such motion, was not sufficient to stay the running of the time for appeal and held that there was no jurisdiction for granting an appeal.

Other authorities have been cited by the petitioner which, upon examination, disclose that they are not in point, and for that reason we do not enter into a discussion of same.

3.

As a further and additional ground sustaining the decision of the District Court and the Circuit Court of Appeals, is the fact that it is apparent from the record that the petitions for rehearing filed after the time provided by Section 39C of the Bankruptcy Act for petitions for reviews, were merely filed for the purpose of reviving and extending the time for filing such petitions for review, and under the decision of this court in the case of *Wayne v. Owens Illinois*, 300 U. S. 131, an appeal should be dismissed where such appears to be the fact. In the opinion of the Circuit Court of Appeals, this was one of the reasons adopted by it in its opinion for holding as it did. In this regard the court said:

"Another deciding feature is that it is quite apparent from the record here that Appellant's petition

for rehearing was filed merely for the purpose of reviving and extending the time for filing the petition for review, under which state of facts, the court in the *Wayne* case said an appeal should be dismissed" (R. 213).

The cases cited by us establish without question that where a petition for rehearing is filed after the expiration of the time for appeal and such petition is denied, as was done in this case, the right to file a petition for review or an appeal has been lost and cannot be restored through the medium of such a petition for rehearing (although the result might be otherwise where such a petition for rehearing is granted, the case reopened and a new judgment entered, as decided in the *Wayne* case.)

4.

Orders of September 7th, CCA No. 7631, for the further reason are consent orders as such cannot be appealed from or reviewed by petition for review or writ of certiorari.

These are consent orders entered on the voluntary stipulation of debtor's counsel (R. 10), and there can be no legal error or injustice therein.

The stipulation on which these orders were entered was made at a hearing set on motion of debtor's own counsel. After that stipulation was made on August 13, 1940, the entire matter was continued for a period of 25 days to September 7, 1940, before any order thereon was entered. Some discussion must have taken place between debtor and his counsel during this interval with reference to these stipulations, because on the date of the entry of these orders, debtor himself was not only present in person but he was also represented not by one lawyer, but by two (R. 111 & 113). All of the pertinent facts touching these orders are contained in the concise statement of facts herein at Pages 6 and 7.

Counsel has argued that the stipulation contained in our statement of facts hereof was not authorized by the debtor. Reference to the concise statement of facts in this brief fully bears out the proposition that debtor authorized this stipulation prior to its entry at the hearing of August 13, 1940, and confirmed it at and prior to the date the orders in question were signed, because he personally sat through the hearing of September 7th, accompanied by his two lawyers, and allowed these orders to be entered without any objection, which brings this situation wholly within the case of *Curry v. Curry*, 79 Fed. (2d) 172 @ 174, wherein the court held:

"It can never lie with a litigant, either by passive consent or by affirmative action, to lead a court to find a fact justified and fit to be carried into judgment and then to contend in another court that the same fact at the same time and within his own knowledge was otherwise and competent to support a contrary judgment. A consent decree within the purview of the pleading and the scope of the issues is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. *A statement in a record on appeal that a party has consented to a decree, is equivalent to an admission that the facts exist on which the decree rests, and the only question open, is whether that decree could be entered in that cause or on any state of facts.* (*Pac. R. Co. v. Ketchum*, 101 U. S. 289, 296, 297; 25 L. Ed. 932. *United States v. Babbitt*, 104 U. S. 767, 26 L. Ed. 921; *Gauss v. Goldenberg*, 39 App. D. C. 597, 599.) And this principle has long been established in English courts where a decree taken by consent cannot be set aside by a bill of review, or a bill in the nature thereof except for clerical error or for something inserted but not consented to. 2 David ch. pr. 1576. Or as the Lord Chancellor put it in the time of Charles II, *there can be neither*

legal error nor injustice in a consent decree. (*Webb v. Webb*, 3 Swanst 656.) (Italics are ours.)

Where an order is entered, such as the three orders in question, with the express or implied consent of a party, he cannot appeal or sue out a writ of error to review the same, and is generally estopped and waives all right of appeal thereon.

"It is a well settled general rule, declared in some states by express statutory provision, that *a party is not aggrieved by a judgment, order, decree or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore he cannot appeal or sue out a writ of error to review the same*, even though there has been an attempt to reserve the right to appeal, and even though the consent order was not authorized by the pleadings.

"Under this general rule, a party generally is estopped or waives right to appeal or bring error when a judgment, order or decree was entered on his motion, offer, or admission or at his request or in conformity with facts admitted by him." (Italics are ours.)

4 C. J. Secundum 404, Sec. 213.

Much is made of Dazey's physical condition, but, as is pointed out (R. 114-115), he became ill on May 21, 1940, more than a month prior to the first hearing and more than four months prior to the entry of the orders of September 7th. If he could not care for his practice, he owed the duty not only to his client but to the court to either engage other competent counsel or withdraw from the case entirely. His conduct in trying to ruin the career of a young attorney (Mr. Coulson) by calling him a "water boy" and blaming him for admissions apparently made with full knowledge and acquiescence of debtor, are, to

say the least, not commendable to such learned counsel as Mr. Dazey is portrayed to be.

As regards the debtor himself, the Circuit Court of Appeals in its opinion (R. 214-215) had the following to say:

"The critical condition of debtor's counsel is to be deplored, but this alone will not excuse the negligence of the debtor in failing to inform the court of his attorney's condition. The debtor was not an ignorant man, for at one time he had been President of the Pure Milk Association of the Chicago area."

As stated above, Coulson was attorney of record for the debtor at the time the stipulation in question was entered.

"Where an attorney is the counsel of record for a client, his agreement and the conduct and management of the litigation must be considered as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client, the remedy of the client is against his counsel." (Italics are ours.)

Bergman v. Rhodes, 334 Ill. 137 @ 142.

"When one puts his case in the hands of an attorney, it is a reasonable presumption that the authority conferred includes such actions as the attorney, in his superior knowledge of the law, may decide to be legal, proper, or necessary in the prosecution of the suit, and consequently whatever adverse proceedings may be taken by the attorney are to be considered binding upon the client. Attorneys may waive objections with respect to pleading, or fail to file pleas, make admissions of fact, and of necessity make dis-

position of many things that arise in and about the trial of cases."

Union Central Life Insurance Co. v. Anderson,
291 Ill. App. 423 @ 436; 10 N. E. (2d) 46 @ 52.

To same effect see:

Clemens v. Gregg, (Cal.) 167 Pacific, 294 @ 297.

American Car Co. v. Industrial Commission, 335
Ill. 332.

A record has been made in this case of the various happenings therein. These records cannot be varied, changed, added to, or detracted from by *ex parte* affidavits, such as the affidavits of Dazey, McClain and Coulson.

"It is a well established rule of the common law, which has been embodied in statutes in a number of states; that when any judgment of any court or any other judicial or official proceedings, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, *the contents of such documents cannot be contradicted, altered, added to, or varied by* parol or extrinsic evidence." (Italics are ours.)

22 C. J. 1070-1074.

"It is contended on the part of appellant that such judgment was merely one of *nol pros*—a decree entered by default—and is, therefore, not a bar to the prosecution of this suit. To sustain this view of the case *he has recourse to a statement by the Clerk of the Circuit Court of the United States* for the Southern District of Ohio (wherein the decree was rendered), under his hand and seal, dated nearly two years after said decree was rendered, to the effect

that no proof or testimony was filed in said cause in his office either for the complainant or the defendant; that at the time of the granting of said decree, May 2, 1882, the complainant did not appear, nor was he represented by counsel; and that said decree dismissing the complainant's bill was granted on default of the complainant.

*"This is the record to which the court must look, and not to the statement of the clerk of the court made two years afterwards. This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in *Durant v. Essex Company*, 74 U. S. 7 Wall 107, 109 (19:154, 156): 'A decree of that kind, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, it is a final determination.'"* (Italics are ours.)

Lyons v. The Perin & Gaff Mfg. Co., 125 U. S. 839 @ 841.

Section 75 (s) (2) of the Act provides:

"The Court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor."

We wish to point out that the stipulation made pertained solely to the facts surrounding the chattels described in the three orders of September 7th. *The stipulation does not constitute a general order that all such property is perishable within the meaning of the Act.*

A reading of petitioner's brief would indicate that Section 75 was enacted solely for the protection of the farmer

debtor but as Judge Hughes points out in *John Hancock Mutual Life Insurance Co. v. Bartels*, 84 L. Ed. 154 @ 157:-

"The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, *while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.* See *Wright v. Vinton Mountain Trust Bank*, *supra*; *Adair v. Bank of American Nat. Trust & Sav. Asso.*, 303 U. S. 350, 354-357, 82 L. Ed. 889, 892-895, 58 S. Ct. 594, 35 Am. Bankr. Rep. (N.S.) 725; *Wright v. Union Cent. L. Ins. Co.*, 304 U. S. 502, 516, 517, 82 L. Ed. 1490, 1500, 1501, 58 S. Ct. 1025, 36 Am. Bankr. Rep. (N.S.) 950." (Italics ours.)

Proper notice of all proceedings herein was given debtor under the rules of court, (See Rule 1, Subsec. E of the Rules of U. S. District Court, Northern District of Illinois, Eastern Division) which provides notice to be served on counsel of record who are residents of this District. Coulson was debtor's only resident counsel of record. Under this rule, notice to him constituted notice to debtor (Tr. 105).

With reference to the orders of September 7th, there is no complaint of coercion, fraud, or duress being practiced upon the farmer debtor in the procurement thereof. Whether under these conditions, Federal Courts will permit a litigant who after due notice of hearing set to come into court on that date and when his opponent is about ready to put in his proof waive the introduction of such proof, enter into a voluntary stipulation, have that stipulation made a matter of court record, return to the same court

twenty-five days later, sit through a discussion of the order in the presence of two of his lawyers, watch the court enter the order based on the stipulation voluntarily made, and then after all time for review thereon has expired ask the court to set aside its order which it has entered with the express consent of farmer debtor so he can reopen the case and put his opponent to the unnecessary expense of bringing back witnesses whose testimony he waived when they were present in court ready to testify, is for this court to decide. We think debtor had full and ample opportunity to present whatever evidence or make whatever argument he wanted on the petitions at the time of the hearing thereon, or, if not then, at least prior to the entry of the orders which were entered twenty-five days after the original hearing at which the stipulation was made by his counsel.

CONCLUSION.

We respectfully submit that the petition for writ of certiorari heretofore filed herein by the petitioner be denied for the reasons and causes hereinabove set forth.

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IN THE
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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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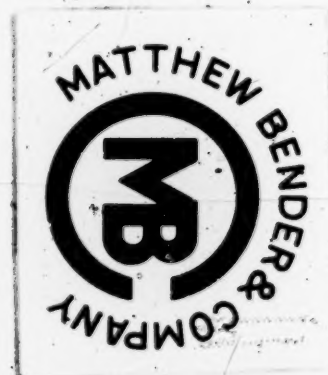
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IN THE
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RESPONDENTS' BRIEF.

FOREWORD.

It is the opinion of the Respondents that the petitioner does not fully and completely conform to the rules of the Supreme Court in the compilation of his brief.

The petitioner's brief has failed to organize the identical or similar topics under one heading and repetitiously refers to them in all parts of the brief. His lack of systematic tabulation of points has made respondents' brief difficult to organize.

For the sake of facilitating reference from one brief to another, we have maintained the same lack of organization and followed the same order as his brief and the points therein discussed.

I.

The Report of the Opinion Below.

The opinion of the Appellate Court below is reported as *Pfister v. Northern Illinois Finance Corporation*, CCA 7, 123 Fed. (2d) 523, decided November 10, 1941. R. 209 to 215.

The District Court below issued no opinion. The two final orders of the District Court are found at R. 173 to 178.

II.

Concise Statement of Facts.

The petitioner has sought in his concise statement of the case and the questions presented to confuse the material issues in this case by inserting immaterial matters into his statement of facts and arguments in his brief not borne out by the record, and which we deem have been placed in his brief for the sole purpose of prejudicing the court and attempting to give the impression that the petitioner has been persecuted and not properly represented.

The farmer debtor has received every consideration and benefit accorded him under Section 75 of the Bankruptcy Act, and has been fully and adequately represented at all hearings herein by counsel of his own choosing.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 209-215) contains an accurate statement of the material facts, which we repeat hereinafter in amplified form.

September 28, 1940, petitioner filed his petition as a farmer debtor under Section 75 of the Bankruptcy Act (R. 2, 14).

June 29, 1940, the first meeting of creditors was held, at which time a written proposal by the debtor to the creditors was filed. The bankrupt was present in person and represented by Robert E. Coulson. At this time the debtor was enjoined from removing or selling soil or personal property from the farm, with the exception of milk, eggs and poultry, and all funds received were ordered held subject to the order of the Referee (R. 7). No moneys were turned in to the commissioner at any time (R. 110).

July 9, 1940, a second meeting of creditors was held, at which time the petitioner was represented in person by Robert E. Coulson (R. 7). All matters were by order continued to July 25, 1940.

July 19, 1940, the petitioner filed in the District Court his amended petition under Section 75S of the Bankruptcy Act (R. 3, 25) which petition showed on its face that he was represented by J. E. Dazey and Robert E. Coulson, as his attorneys of record (R. 26).

July 25, 1940, appraisers were appointed and leave was granted to the Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son to file petitions for reclamation and/or for sale of personal property by August 10, 1940 (R. 8). At this hearing the petitioner was again represented in person by Attorney Robert E. Coulson.

It will be noted that up to this time the petitioner had been present in open court and represented by his attorney, Robert E. Coulson, and that all of the papers filed in the cause to date showed the said petitioner to be represented by both Robert E. Coulson and J. E. Dazey, attorneys. Mr. Dazey never appeared at any time or at any hearing, although his presence was often requested by the referee (R. 109, 114, 158). Mr. Coulson had handled all of the hearings to this time, had submitted proposals in

the presence of the farmer debtor, had made a motion for the appointment of appraisers and generally looked after the interests of the farmer debtor (R. 112, 161, 162).

August 7, 1940, by leave of court first had and obtained, the petitions of Hartman & Son and Algonquin State Bank for reclamation of personal property were filed (R. 8).

August 10, 1940, after leave had and obtained (R. 8) the petition of Northern Illinois Finance Corporation for reclamation of personal property was filed. On this same day the debtor, through Attorney Robert E. Coulson, filed a petition for an order to fix the amount of rent for the encumbered real estate and personal property (R. 9, 65).

August 13, 1940, being the adjourned meeting of July 25, 1940, a motion was made by E. C. Hook and other creditors, in which the petitioner (farmer debtor) joined, that the rent of the farm and personal property be set, at which time the court entered, in behalf of E. C. Hook, the order which is hereinafter referred to as the order of August 13, 1940, and which is for the purpose of appeal known as Case No. 26 (R. 9, 72-77).

August 13, 1940, a hearing was likewise had on the petitions of Hartman & Son, Northern Illinois Finance Corporation and Algonquin State Bank, which finally resulted in orders being entered on these three petitions and which are commonly referred to hereinafter as the orders of September 7, 1940, and which represent the appeal to this court in Case No. 27 (R. 10, 77-88).

A. Two separate cases involved.

From the above it is clear that there are actually two cases involved; one, the order of August 13, 1940 which, in the Circuit Court of Appeals, was known as No. 7362 and is here known as No. 26, and the other being the orders of September 7, 1940 which, in the Circuit Court of Appeals

was known as No. 7361 and is here known as No. 27. The orders of September 7, 1940 actually involve three separate orders on the petitions of Northern Illinois Finance Corporation, Algonquin State Bank and Hartman & Son. These two separate cases are independent of each other and were consolidated in the Circuit Court of Appeals and in the present hearing for the purpose of convenience in appeal only. In order to keep the facts and matters involved distinct and clear to the court, we shall hereinafter consider each case separately, beginning with the proceedings in the Referee's office commencing August 13, 1940.

B. Order of August 13, 1940 (Case No. 26).

It will be remembered that on August 10, 1940, the petitioner (the farmer debtor below) petitioned the court to fix the amount of rent to be paid for the use of the encumbered real and personal property (R. 9, 159). This verified petition filed by the farmer debtor, through his attorney, stated at its conclusion "the end of the first year of your petitioner's moratorium will be on or to-wit the 26th day of April, A. D. 1941" (R. 68).

August 13, 1940, this hearing was held and at that time, after a complete discussion of the matters and things involved pertaining to the setting of a fair rental for the use of the real and personal property, the petitioner, through his attorney, Robert E. Coulson, suggested that the rental and principal payments for the real and personal property be fixed between certain designated amounts each year, suggesting therein maximum rental figures and minimum rental figures (R. 159, 162), and further suggesting that it would be an aid to the rehabilitation of the debtor if payments required be reduced for the first year, increased in the second year with a further increase for the third year, so that the total payments made will equal the sum determined by the court as a fair annual rental

(R. 73). Upon the recommendation of the petitioner, through his counsel, and after fully considering the merits of the rental payments, the Conciliation Commissioner fixed the rentals and principal payments at a figure approximately midway between the maximum and minimum amounts suggested by petitioner's counsel (R. 72-76, 159, 162, 151-157). At this hearing the petitioner and his counsel had full opportunity to present whatever evidence they saw fit with reference to the rental value of the property (R. 163). No attempt was made by either of them to introduce any evidence whatsoever. The petitioner's attorney was presented with a copy of the order before the entry of same. Reference to the written opinion of the Conciliation Commissioner to the petition for re-hearing (R. 158-164) substantiates each and every fact hereinbefore set out. These are matters of record, about which there should be no difference of opinion and which cannot be changed by mere affidavits filed to achieve a particular end. The order of August 13, 1940 likewise fixed the period for the stay of proceedings from April 26, 1940 for a period of three years, in accordance with the petition of the farmer debtor hereinbefore set out (R. 160).

No petition for review of the order entered on August 13, 1940 was filed within ten days from the entry thereof, nor was any request for extension of time within which to file a petition for review ever made by the farmer debtor (R. 160).

September 16, 1940, thirty-four days after the entry of the order on August 13, 1940, the farmer debtor, petitioner herein, for the first time filed his petition for re-hearing of the said order of August 13, 1940 and thereafter on September 23, 1940 filed his amendment thereto (R. 10, 139, 160). This petition was filed by the petitioner's present attorney, Elmer McClain, and Robert E. Coulson (R. 145). A motion to strike this petition for re-hearing was

filed by Algonquin State Bank, Northern Illinois Finance Corporation and Hartman & Son only, these creditors having no direct interest or benefit in the order of August 13, 1940 (R. 12, 148). Neither E. C. Hook nor Emil Geest, the creditors directly involved by the order of August 13, 1940 filed a motion to dismiss the petition for re-hearing, although the petitioner in his brief at page 9 would have the court believe otherwise. This is likewise a matter of record. The petition for re-hearing of the order of August 13, 1940 (R. 139) attempted to impugn the record and the opinion of the Referee (R. 158-164) by inferring that no opportunity was given to present evidence of reasonable rentals at the hearing on August 13, 1940, although the opinion of the Referee shows otherwise; also, that the period of the stay of proceedings was contrary to law, although the Referee followed the suggestion of the petitioner, as hereinbefore stated; and for the first time anywhere in the records or files in this cause stated that Robert E. Coulson was only a "water boy" and was not authorized to do anything in the cause except as authorized by Attorney Dazey and that his authorization was only to file papers prepared by Attorney Dazey and that Mr. Dazey did not know of any stipulations or agreements in the cause, having been ill of apoplexy since May 21, 1940; submitting as corroboration thereof an affidavit to the same effect signed by Mr. Dazey and Mr. Coulson.

The Conciliation Commissioner on numerous occasions requested the presence of the debtor and Attorney Dazey at the respective hearings (R. 163). Mr. Dazey's condition of health was first called to the Commissioner's attention by the petition for re-hearing and at no time were the proceedings ever continued because of Mr. Dazey's health. Mr. Dazey suffered his stroke of apoplexy May 21, 1940, more than a month before the first meeting of creditors, yet no mention thereof or complaint of lack of proper

representation or fraud practiced upon him was made by the farmer debtor until the petition for re-hearing. The allegations of the petition for re-hearing are directly contrary to the record and the facts contained in the opinion of the Referee (R. 158-164).

November 28, 1940 the Conciliation Commissioner denied the petition for re-hearing. On the same day the petitioner filed with the Conciliation Commissioner his petition for review (R. 165), which petition in effect set forth that the farmer debtor has been unable to present either evidence of facts or legal authorities or arguments, that the court erred in ordering the rental payments at the amounts which Referee had set at the suggestion of the farmer debtor, and that no evidence was taken on the subject of payments (R. 171). As hereinbefore stated, the Referee's opinion showed that a full opportunity had been accorded to the farmer debtor to present the very matters complained of in his petition for review (R. 158-164).

December 16, 1940, the District Court dismissed the petition for review on the ground that the petition for re-hearing of the order of August 13, 1940 was filed after the expiration of the time allowed by the rules of court and the statute in such case made and provided, and that the petition for re-hearing having been denied the denial thereof would not extend the time for filing a petition for review (R. 173-175).

C. The Order of September 7, 1940 (Case No. 27).

August 13, 1940 was the day set for the hearing on the petitions of Northern Illinois Finance Corporation, Hartman & Son and Algonquin State Bank (R. 9). At this hearing the farmer debtor was represented in person by Robert E. Coulson, his attorney. The petitioning creditors offered witnesses to prove that cattle of the ages covered

by their conditional sales contracts and chattel mortgages were perishable, within the meaning of Section 75S of the Bankruptcy Act. After the witnesses were sworn, but before any evidence was given by them, the farmer debtor's counsel voluntarily stated that such testimony was not necessary, that he would stipulate that the security of said three creditors was perishable, within the meaning of the Act. This oral stipulation was entered on the Commissioner's docket under date of August 13, 1940, as will appear both by reference to the Commissioner's docket (R. 9-10) and by reference to the opinion of the Commissioner, in which these facts are definitely and clearly stated (R. 109-116). The Commissioner's docket shows the following:

"Hearing on reclamation petition and stipulations by the debtor and each of the following claimants: Hartman & Son, Northern Illinois Finance Corporation and the Algonquin State Bank, that the personal property described in the petition is perishable within the meaning of Paragraph No. 2, sub-sec. S of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the reclamation petition is not at this time claimed by debtor as exempted property. Hearing on all further motions and petitions continued to August 30, 1940 at 10 o'clock A. M. (D. S. T.)" (R. 10).

All matters were continued to August 30, 1940. The Conciliation Commissioner at said time specifically requested that Attorney Dazey be present at the hearing of August 30, 1940 (R. 100).

August 30, 1940, at the request of Mr. Coulson the hearing was continued to the 7th day of September (R. 10, 100).

September 7, 1940, a further hearing was had on the petitions of the three petitioning creditors hereinbefore

mentioned, asking for the sale of the cattle, at which time the prayer of the petitions was granted (R. 10, 100, 101, 111, 113). At this hearing the farmer debtor was present in person and represented by Attorney Robert E. Coulson and Attorney U. G. Ward, the latter being an attorney from Shelbyville, Illinois (R. 111, 113). At this hearing a full discussion was again had relative to the entry of the orders of September 7, 1940, a full opportunity was given to debtor to indicate his position before the entry of said orders, no offer of proof was made by the farmer debtor on the question of the sale of the cattle, no request for further time or for leave to put in additional proof was asked by the farmer debtor (R. 113, 114). The appointment of an auctioneer to conduct the sale as provided in the petitions was discussed with the farmer debtor and his attorneys, and as a result of said discussions William Chandler was appointed the auctioneer to conduct the sale of the cattle (R. 110). Still no mention was ever made of the inability of Mr. Dazey to be present and represent the farmer debtor, nor was any complaint at this hearing or up to this date made that the farmer debtor was not being properly represented. The orders of September 7, 1940 were then entered (R. 10, 77-78). All of the above and foregoing is fully and clearly set forth in the Conciliation Commissioner's opinion on the petition for re-hearing (R. 109-116).

September 17, 1940, the farmer debtor filed a petition for an emergency restraining order in the District Court for the Northern District of Illinois (R. 27-35) to which was appended an affidavit of Robert E. Coulson that he was the attorney of record of the farmer debtor (R. 34, 98).

September 19, 1940, an affidavit was filed by J. E. Dazey in the District Court for the purposes of the emergency petition, which for the first time set forth the fact that Mr. Dazey had been suffering since May 21, 1940, more

than a month before the first creditors' meeting of apoplexy and further saying that Robert E. Coulson was not authorized to take any of the steps taken by him in the case, but was only authorized to file papers (R. 34). The petition for emergency restraining order was denied by the Honorable William H. Holly, Judge of the District Court, on September 19, 1940 (R. 3, 41), which hearing the Conciliation Commissioner attended and testified as to his record and files. Attorney U. G. Ward had apparently been sent by Mr. Dazey to attend the hearing of September 7, 1940, but had made no mention of Mr. Dazey's inability to be present or made any complaint thereof.

September 20, 1940, Robert E. Coulson filed a motion to withdraw his appearance as attorney. On the same day, after the ten-day period of time allowed for the filing of a petition for review had expired and without a petition for an extension of time ever having been filed, the farmer debtor, through Elmer McClain, the fourth attorney to represent the farmer debtor, filed a petition for re-hearing of the orders of September 7, 1940 (R. 11, 88). This petition again set forth that Mr. Coulson was not authorized to do anything except file papers and that Mr. Dazey did not know of any stipulations or agreements in reference to the case; that as soon as he heard about the stipulations he, Mr. Dazey, procured the services of the only attorney who had had extensive practice in farmer debtor proceedings, namely, Elmer McClain; that the farmer debtor did not learn until September 19, 1940 that three orders had been entered by the Conciliation Commissioner to sell the chattel property; that he desired to present evidence on the matter, which opportunity he had not had an opportunity to do to date, to which petition Robert E. Coulson attached an affidavit stating that he had no authority except to file papers and that he did not stipulate or agree that the cows were perishable (R. 88-95). This is

directly contrary to the docket entries of the Commissioner and the opinion of the Commissioner (R. 109-116) in which it is shown that the orders of September 7, 1940 were entered in the immediate presence of the farmer debtor and two of his counsel, Robert E. Coulson and U. G. Ward, without any objection on their part.

September 23, 1940, the farmer debtor, through Elmer McClain, filed an amendment to the petition for a re-hearing, alleging that he did not see the orders of September 7, 1940 until one was shown to him on September 19, 1940 in the hearing before Judge Holly and that he did not sell two of the cows claimed by Hartman & Son, but that one became infected with mastitis, which was a dangerous and infectious disease of dairy cows, and that her usefulness as a dairy cow became so impaired that in order to save as much of her value as possible he sold her for beef (R. 95, 96)..

September 26, 1940, answers to the petition for re-hearing were filed by the three creditors involved in the orders of September 7, 1940 (R. 95-107) with an affidavit thereto that the attorneys for the creditors were about to begin the interrogation of witnesses on August 13, 1940, when the stipulation was voluntarily offered by the attorney for the farmer debtor (R. 106, 107). All of the facts set forth in the answer of the three creditors is substantiated in the opinion of the Referee (R. 109-116). No motion to dismiss the petitions for re-hearing of the orders of September 7, 1940 were ever filed by any petitioning creditor and the record bears out this fact, although counsel for the petitioner at page 9 of his brief would again have the court believe otherwise and consider matters extraneous to the record.

September 30, 1940, the Conciliation Commissioner entered a draft order denying the petition for re-hearing.

October 9, 1940, the farmer debtor filed his petition for review of the three orders of September 7, 1940, no extension of time for filing a petition for review ever having been asked for. This petition for review set forth the same prejudicial matters as contained in the petition for rehearing, which allegations are contra to the record in said cause (R. 116) and which could be entered in the petition for review only for one purpose, that of attempting to prejudice the court against the three creditors upon matters which were not only exaggerated but were not true. (See affidavit of creditors R. 192, 194 and opinion of court R. 109-116.) .

December 20, 1940, the petition for review was dismissed by the Honorable William H. Holly, Judge of the District Court for the Northern District of Illinois, Eastern Division.

III.

Summary of Argument.

This case does not involve any issue of substantive right. It involves solely questions of procedure.

It resolves itself first in the question of whether Section 39C or 75S of the Bankruptcy Act governs the time within which petitions for review of orders of the Referee may be taken before the District Court. It is the contention of the respondent that Section 39C prescribes this limitation; that Section 75S refers solely to objections, exceptions and appeals as to the appraisal in such section specified.

The petitioner failed to file a petition for a rehearing within the time allowed for the filing of a petition for review, and allowed the time for review to expire before filing such petition for rehearing. He therefore cannot

re-invest himself with that right by filing a subsequent petition for rehearing which is denied.

The petition for rehearing was not filed in good faith, but solely for the purpose of appeal; therefore no extension of time may be predicated thereon.

The petitioner having induced the court to pursue a certain course, he may not later complain of any action which the Court has taken on his own suggestion or initiative.

The orders of August 13, 1940 and September 7, 1940 were consent orders, therefore, no objection, exception or appeal thereto can be taken by the consenting party and no appeal will lie therefrom. Such judgments are a record more of the contract or agreement of the petitioner than of the judicial determination of the matters therein contained by the Court itself.

IV.

ARGUMENT.

Petitioner's VII. (Page 16, Petitioner's brief)

A. GENERAL NATURE OF ORDERS.

1.

Their relation to substantive rights.

Debtor in the first paragraph of his brief under this heading at page 16 would apparently lead the Court into believing that the farmer in this instance has not received

all the benefits under the Act which he has asked, or to which under the circumstances of this particular case he is entitled.

1. Debtor complains that at the time of finally fixing the rent on August 13, 1940, two years, eight months, thirteen days only remained of his three-year stay, and he set forth this matter in his petition for rehearing on the order of August 13, 1940. The Referee found this period was fixed upon motion of the farmer-debtor himself in his petition filed in this case on August 10, 1940, (for the text of that motion see debtor's petition, R. 65 and 68) defining the period to the Court in words as follows: "that your petitioner's moratorium began running on or to-wit the 26th day of April, 1940, and said first year of the moratorium will expire on or to-wit April 26, 1941".

If there is any error in the date of this moratorium it was caused by representation of debtor himself. Where a litigant or his counsel has persuaded a Court to pursue an erroneous course in any proceeding he cannot later complain of the orders entered at or on his own request.

2 and 3. Debtor now complains of the amount of the rent. The record shows the referee found (R. 162): "that at that time the debtor's counsel suggested maximum figures and minimum figures for the rental, and principal payments to be made by the debtor and, after hearing had, the order as entered fixed a rental and fixed the principal payments at amounts which were substantially less than the maximum amount suggested by the debtor's own counsel." The debtor should not be heard to complain of an order entered pursuant to his own suggestion and within the limits of his consent.

4. The argument under this point attempts to appeal to the sympathy of the Court by alleging a stripping of the farmer debtor of his personal property "under the

guise of perishable property." The creditors counter by the same type of argument.

On March 1, 1940 the order of reference to conciliation commissioner was made. On June 29, 1940, Bankrupt was examined and draft order entered that "debtor be prevented from removing soil, or personal property from farm, with exception of milk, eggs, and poultry, that he hold funds received from such sales subject to the order of Court." (See R. 7 and 158.)

No where in the record is it contended that the debtor turned over any part of the proceeds from the sale of milk, eggs and poultry, or the stipulated rent, or any "reasonable rent." The order authorizing the sale of cattle as perishable property was not made until September 7, which was ten days after the extended time for making the first rent payment.

The record does not disclose any payments by the debtor to the referee or conciliation commissioner at any time and states affirmatively that on Nov. 28, 1940, "No moneys were ever turned in to commissioner by debtor at any time" (R. 159) nor does it disclose any payment from the sale of two cows admittedly sold by him (R. 78) because of infection by disease (R. 115). Although the debtor stated under oath before the referee in this proceeding that all the cows and bull contained in the Northern Illinois Finance Corporation mortgage were still on his farm except one cow (R. 63, 85), nevertheless, the order of the referee (R. 85) found that the report of appraisers showed 8 cows missing from the security of the Northern Illinois Finance Corporation mortgage. The appraisal showed only a total of 18 cows and one bull (R. 70-71) although the mortgages covered 45 cows (R. 79, 81, 87) and the appraisal of the debtor's cattle was \$1330.00 compared to \$2243.80 in claims of these creditors (R. 113). This

best demonstrates that these cows in the hands of this debtor were "perishable." Thus, after a period of two years and six months after first petition was filed, Bankrupt has made no payments of any kind. Instead of being deprived of his income-producing property he has periodically disposed of parts of it without any payments to the Commissioner for almost three years to the detriment of the security of creditors. By this procedure he has not increased his ability to rehabilitate himself nor has he shown any desire to rehabilitate himself under substantive rights. He has maintained possession by legal technicalities with no substantive effort to pay his creditors.

John Hancock v. Bartels, 308 U. S. 180.

2.

The procedures employed.

Counsel is unable to discover the violations of "various procedures" by the "design" so apparent to the debtor in the orders of August 13, 1940, and of three orders of September 7, 1940, and so without more specific assignments of error cannot answer this point. Reference to the statement of facts contained herein (pages 1-12) justifiably shows the reason and foundation underlying the entry of the order of August 13, 1940 and the three orders of September 7, 1940.

B. DECISION OF DISTRICT COURT.

On page 18 of petitioner's brief he asserts the final orders of the District Court below are in conflict with that Court's own decisions in *In re Madonia*, 32 Fed. Sup. 165, shown as case 31, at page 25 of debtor's supplemental brief. From excerpts contained in petitioner's supple-

mental brief (page 25 of supplemental brief), it is clear leave was asked and extension granted for just cause to file a petition for review after the 10 day period expired, which brings it directly within Section 39-C of the Bankruptcy Act, which section provides:

"The person aggrieved by an order of referee may within 10 days after the entry thereof, or within such extended time as the Court may *for good cause shown* allow, file with the referee a petition for review—"

Counsel for petitioner, being a self-designated expert in proceedings of farmer debtor (R. 90) must have known that time for filing might be extended if he could show good reason therefor. He evidently knew he could not make an ample showing in this case to persuade the Court to extend the time, so he has taken the more confusing course under the procedure now under consideration in this Court. We, therefore, maintain there is no conflict between the decision of the District Court in the *Madonia* case and in the case at bar. See *In re L. & R. Wister & Co.*, 237 Fed. 793 at 795, page 30 of this brief.

C. THE OPINION OF CIRCUIT COURT OF APPEALS.

1.

Debtor's first discussion under this heading concerns the application of Section 75-S and Section 39-C of Bankruptcy Act. In his original brief in the Circuit Court of Appeals it was his contention that Section 75-S governed on the questions of all petitions for review from referee or Conciliation Commissioner's orders to the exclusion of Section 39-C. This proposition was answered in appellee's brief in the Circuit Court of Appeals, and appellant in his reply brief thereto abandoned his original stand,

saying he had complied with Section 39-C in the instant case. Not being definitely sure which argument petitioner will pursue in this case, we will discuss both sections later. (See Discussion and Citations under Argument on Petitioner's Specifications of Error, pages 36 to 41 of this brief.)

2.

The petitions for rehearing filed herein were not sufficient to revive the right of review lost by failure to file such petition within the period prescribed by Section 39-C.

We do not agree with debtor's interpretation of that portion of the Circuit Court of Appeals' finding, set forth on page 20 of his brief.

On page 21 of his brief he sets forth four statements in the following language:

Statement 1. The petition for rehearing was granted;

Statement 2. And the old judgment was vacated;

Statement 3. And a new judgment was entered;

Statement 4. Or the petitions for rehearing were filed within the time for appeal,

which he seems to infer must all occur in a particular case before it complies with the Circuit Court of Appeals' decision.

We do not know whether counsel intentionally was trying to cloud the issue by this inference or not so we are calling the Court's attention here to the fact that the Circuit Court of Appeals mentioned the first three grounds in the conjunctive and the last or fourth ground in the disjunctive. It must appear either that the petition was filed in time, as suggested under Statement 4 above, or that the petition for rehearing was granted, as in Statement 1, the old judgment vacated as in Statement 2, and a new judgment entered as in Statement 3.

On page 22, petitioner lists his table of cases showing the applicability of these four statements to the various cases therein cited, and then draws his conclusions therefrom on page 23 of his brief. The first four cases of the table on page 22 were considered by this Court in the rendition of *Conboy v. First National Bank*, 203 U. S. 141; see page 142 of that opinion, and having been so considered may be dismissed without further comment herein. (The *Conboy* case is discussed hereafter on page 43 of this brief.) In the fifth case, *U. S. v. Ellicott*, 223 U. S. 524, the petition was filed within the time as required by Statement 4. In the sixth case, being *Citizens v. Opperman*, 249 U. S. 448, the petition for rehearing was filed within the time allowed even though counsel states that this point is not discussed. In *Morse v. United States*, 270 U. S. 151, being the seventh case, petitioner admits that Statement 4 is correct. In *Gypsy v. Escoe*, 275 U. S. 498, being the eighth case, Statements 1, 2 and 3 are correct. In *U. S. v. Seminole*, 299 U. S. 417, the petition for rehearing was filed within the time so Statement 4 is correct. In the case of *Wayne v. Owens-Illinois*, 300 U. S. 131, being number ten, the petition for rehearing was granted, the old judgment vacated, and a new judgment entered. In number eleven, *Carpenter v. Condor*, 108 Fed. 2d, 318, petitioner admits the petition was filed within the time. In *Bowman v. Lopereno*, 311 U. S. 262, being the twelfth and last case, the petition for rehearing was filed within the time. Thus in each and all of the cases listed in the prepared table of counsel, shown on page 22; the holdings in each case are directly in conformity with the opinion of the Circuit Court of Appeals in the instant case, and each of them follow the long established rule of law as laid down by this Court, and enunciated in *Conboy v. First National Bank*, *supra*.

3.

The Circuit Court's finding that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review.

The next point in the Circuit Court of Appeals' opinion which is criticized by debtor is the finding therein (R. 213) that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review. This is followed by reference to certain affidavits inserted in the record by petitioner in support of his petition for rehearing, and all of which were by the Conciliation Commissioner and Referee herein found to be false, not upon testimony submitted him but from his actual knowledge of what transpired at all the hearings in this matter from its inception to the date on which the order denying the petition for rehearing was entered. We will consider these points in the same order as in debtor's brief.

FIRST

The action occurred while J. E. Dazey, alleged chief counsel, was incapacitated with apoplexy. On this the record shows and the Conciliation Commissioner finds (R. 163-164) that the condition of Dazey's health was never mentioned until brought to the Court's attention in the petition for rehearing. No continuance or extension of time was ever requested because of it, and the only information the Referee had of his condition was that contained in Mr. Dazey's affidavit, and according to that affidavit this condition occurred prior to May 21, 1940, and more than a month prior to the first meeting of creditors (R. 163-164) (R. 109-116).

SECOND

His next contention is that Mr. Coulson was not authorized to represent the petitioner substantively (self-serving affidavit of Mr. Coulson, R. 94-95), but was a water boy and did not stipulate or agree that the cows were perishable. Mr. Coulson is an attorney of law, admitted to practice in the State of Illinois, and has his offices in the same city in which the Referee held all the hearings connected with this cause, and all the hearings complained of herein, a city of approximately 35,000 inhabitants. Coulson's office is within the same block in that town and within 300 feet of the office of Mr. Givler, the Referee. Coulson signed the petition of the debtor to be adjudicated a bankrupt herein (R. 3, 26, 112). There is nothing in the record to indicate that Coulson's authority was limited, and there is nothing in the law which requires opposing counsel or opposing parties to inquire into the contract of employment between opposing counsel and his client. Coulson made motions, arguments and suggestions, attended all meetings, some in company with the farmer debtor, and some without. The Referee found (R. 163) that debtor's complaint as to adequate representation could not be from lack of number or of ability of his counsel. The statement in his affidavit that he did not make the stipulation with reference to the cows cannot be received by this Court to contradict a matter of record. The record is established on this phase (See R. 10; R. 78, paragraph 2; R. 85, paragraph 5; and R. 111) and cannot be disregarded, *Ott v. Thurston*, 76 F. (2nd) 368.

Debtor states he employed new counsel as soon as he heard that this property was to be sold. The fact is the farmer debtor was in Court in person when the order was entered (R. 111), and he was also represented by two

lawyers at that hearing (R. 111). He was given full opportunity to indicate his position before the order was entered, but no offer of proof was made, no request to put in further or additional proof was asked, prepared orders were submitted authorizing such sale and were signed in the presence of the debtor, all without his objection (R. 113).

On the allegation of lack of notice we further call the Court's attention to the fact that in the order on the petition of Hartman and Son (R. 78, paragraph 2) the finding of the Commissioner was:

"That all parties hereto have had full and complete notice of the filing of said petition by said Commissioner, and of the hearing to be had hereon on this date, and that the Court had full and complete jurisdiction of the parties and the subject matter in said petition contained."

A like finding was made in the order on the petition of Northern Illinois Finance Corporation (R. 79, par. 5).

Affidavits are not admissible in any proceeding to contradict a considered order duly entered of record by a Court, and cannot be received in any proceeding for the purpose of impeachment of such records. 22 C. J. 1070-1074; *Lyons v. The Perin & Gaff Mfg. Co.*, 125 U. S. 698.

The affidavits filed herein were either made with a careless disregard of the fact, or very near the edge of falsehood. The Commissioner and Referee himself was conversant with the facts in this case as they transpired before him, and his finding of facts in his opinion reflects a dignified cautious restraint in his interpretation of the veracity and foundation of those affidavits. However, the record on this point speaks for itself, and the order of the Conciliation Commissioner patiently and thor-

oughly disposes of each and every one of the various items set up by farmer debtor in his desire to further extend these proceedings.

The findings of fact of the Referee or Conciliation Commissioner should not be disregarded, and should not be set aside unless error or mistake of Referee clearly appears. *Ott v. Thurston*, 76 Fed. (2d) 368.

FOURTH

There is nothing under this point which warrants or merits an answer.

FIFTH

Under this phase the petitioner merely attempts to rehash the points that he has already raised in Second and Third hereinabove answered. We respectfully represent that the opinion of the Referee (R. 109 to 116 and 158-164) fully answers all of the allegations contained in this phase. The affidavits of Attorney Dazey and Attorney Coulson, attached to the petition for rehearing, were countered by affidavits of the attorneys for the creditors (R. 106, 193). Mr. Coulson should not be heard or allowed to contradict by an affidavit the very things that he has consented to in open Court, and which are reflected in the Conciliation Commissioner's docket, who, as an impartial commissioner has no interest other than to arrive at a just decision based upon the evidence and material submitted.

The petitioner calls attention to the fact that three of the respondents moved to strike the petition for rehearing of the order of August 13th. As pointed out in the Statement of Facts the three creditors who moved for a dismissal of the petition to rehear the order of August 13th, as will be borne out by the record (R. 148), were creditors

who had no interest whatsoever in the order of August 13th, and were not affected thereby, and therefore said motion was of no effect as to the parties directly involved.

SIXTH

Under this phase the petitioner again rehashes matters contained in phases First, Second and Third under this point, which we have already hereinabove answered.

Mr. McClain refers herein to his inability to find the entry of the orders of September 7th in the Commissioner's docket entries on September 12, 1940. Suffice it to say in answer to this allegation that the same contention was made before the Honorable Judge William H. Holly, and that at said time Mr. Givler, the Commissioner and Referee, was present in open Court and denied each and every contention of Mr. McClain as counsel for the farmer debtor, petitioner herein, and had his books in open Court showing all of the docket entries. This counsel for petitioner cannot deny. This is merely another exhibition of the effort on the part of the petitioner to misrepresent the facts as found by the Referee in his docket entries (R. 10), and his opinion (R. 113, Par. 7).

SEVENTH

At point III hereinafter set out we shall further discuss the point that the petitioner filed his petition for rehearing for the mere purpose of extending the time in which to appeal (page 48, *supra*.)

We call the Court's particular attention to the fact that nowhere in his petitions for rehearing has he questioned the amount of the rentals or the period of the stay provided in the order of August 13th, which are the things which this order considered. His petitions for rehearing

of the orders of September 7th, 1940 did not question the perishability of the chattel property therein directed to be sold. The sole argument and the sole contention on these petitions was the question of whether the bankrupt had had a full and complete hearing and was therefore addressed not to the merits of the orders themselves, but to the discretion of the Referee, before whom these proceedings were had, as to whether the employment of Coulson was limited, and the ability of Dazey to appear and participate in the proceedings. Under such circumstances, the Court did not entertain these petitions for rehearing on the merits of the matters in controversy, as counsel herein has so vigorously suggested without any basis in fact.

If counsel's contention, namely: that the Referee's actions herein constituted an entertainment of the petition for rehearing on the merits and revived the right of review which had been through his own actions lost, then we wonder if any order in any cause might ever become final. Would it not be possible under such a state of law, as counsel propounds, for a defeated party to come in any time after an order had been entered and time for review had expired and file a petition for rehearing regardless of how frivolous, false or groundless, without any leave being had by the Court to file such a petition, file it with the Clerk; and then call the matter up for hearing? In order to deny the petition, the Court in fairness would have to make some order in connection therewith, would have to read or consider it in some manner. If the Court then entered an order denying the petition for rehearing, would that, under this state of facts, revive a right of review which had already expired? The instant case comes within the same category.

It is our contention that the law does not contemplate such a circumvention of justice. It does not contemplate

such a revival of procedure lost through negligence or neglect of the litigant or his counsel.

"Where there was no request for extension of time within which to file a petition for review of the decision of the Referee in Bankruptcy, a petition which was filed more than ten days after the entry of the Referee's order was not timely."

In re Brown, 35 Fed. Supp. 619.

Kyser v. MacAdam, 117 Fed. 2d 232, 235.

"We do not think that the right of the Court to modify judgments * * * means that the limitation prescribed by Congress in an effort to minimize the evils of the laws' delays may be evaded by the simple expedient of filing a petition for rehearing after the right of appeal has been lost by delay."

McIntosh v. United States, 70 Fed. 2d, 507.

4.

The Three Orders of September 7th, 1940, were "consent orders" and not appealable.

a. Petitioner under this point in his brief denies the three orders of September 7th are "consent orders." There can be no other conclusion on the record of these cases but that these orders are consent orders. The record shows (R. 110) that these three orders of September 7, 1942 were heard before the Referee on the 13th of August, 1940; that at that hearing the three petitioners appeared with their various witnesses to make proof that cattle of the ages covered by their Conditional Sales Contracts and Chattel Mortgages were perishable within the meaning of the Act in support of the allegations in their petitions contained (R. 111). After these witnesses were sworn, and were about to proceed with their proof, debtor's

counsel, without any solicitation and of his own volition, stipulated that he would waive the proof and would stipulate that the property in said petition mentioned was perishable within the meaning of this section (R. 111).

In the order of Hartman & Sons of September 7th (R. 78) and in the order of Northern Illinois Finance Corp. (R. 85, paragraph 5) is contained a finding of the Court that this stipulation was so made. Thus in these orders themselves there was not only a stipulation on the record itself but a finding in the orders which were that day entered. The assertion in petitioner's brief that counsel had not "consented" or "stipulated" or "agreed" is made in desperation and without foundation in fact.

The Referee before whom all these proceedings were had so found not only in the orders of Hartman & Sons and Northern Illinois Finance Corp., entered on said date (R. 78, 85), but in his subsequent order over-ruling or denying the petitions for rehearing (R. 111, 113).

b. We do not know whether counsel by his brief admits that consent orders are not appealable, we assume he does, but with the various changes and migrations of position and logic we are unable to say what position he might take in any reply brief filed herein, and for that reason we call the Court's attention to the following decisions, which hold that orders entered by consent are not appealable.

Pacific R.R. Co. of Missouri v. Geo. E. Ketchum,
101 U.S. 289; 25 Law Ed. 932 at 935.

U. S. v. Babbitt, 104 U.S. 767; 26 Law Ed. 941.

Curry v. Curry, 79 Fed. (2nd) 172.

Bergman v. Rhodes, 334 Ill. 137 at 143.

4 C. J. *Secundum* 404 Sec. 213.

The acts, stipulations and conduct of litigation by debtor's counsel of record are the acts, stipulations and conduct of the debtor himself.

Bergman v. Rhodes, 334 Ill. 137 at 142.

Union Central Life Ins. Co. v. Anderson, 291 Ill.

App. 423 at 436; 10 Northeastern 2nd. 46 at 52.

American Car Co. v. Industrial Commission, 335 Ill. 322.

What has been said here and above with reference to the orders of September 7th may equally apply to the order of August 13, 1940 wherein the rental for the moratorium is set as shown by the record herein (R. 9). The rental therein fixed was at an amount within the range suggested by farmer debtor himself through his counsel (R. 159) as admitted by petitioner herein in his brief at page 31.

The matter of finality of consent orders is hereinafter more fully argued under point IV, page 48.

5.

The point that the District Court "had no power" to hear the petitions for review.

Petitioner complains of the conclusion reached by the Circuit Court of Appeals (R. 214) in the last paragraph of the opinion that

"The District Court followed the statute and it had no power to do otherwise."

Section 39-C of the Bankruptcy Act provides in part as follows:

"The person aggrieved by an order of a referee may, within ten days after the entry thereof or may within such extended time as the Court may, for cause shown allow, file with the referee a petition for review of such order * * *"

We have no argument with the ultimate conclusions reached in the decisions under this point cited by the peti-

tioner. In those cases where the petition for leave to appeal was filed after the expiration of the ten day period of limitation a petition for an extension of time within which to file a petition for review was asked for and granted before the petition for review was filed. This is not the situation in the instant case. As was said in the case of *In re Albert CCA 2* (1941) 122 Fed. (2d) 393, a case cited by the petitioner:

"The limitation is upon the right of a party aggrieved to obtain a review of a referee's order instead of upon the right of the Court to grant one."

Admittedly, had the petitioner in the instant case asked for an extension of time in which to file his petition for review then and in that event the Court would have had the power to grant such extension for just cause. However he made no such application for extension of time in which to file a petition for review. The petition for review having been filed after time and no extension having been granted or applied for, the District Court was right in deciding it had no jurisdiction to consider the petition for review, the petitioner not having complied with the provisions of Section 39-C of Chandler Act.

In re "L & R Wister & Co., 237 Federal 793 at 795," held:

"It is not questioned that proceedings in bankruptcy generally are in the nature of proceedings in equity, *Bardes v. National Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, or that courts of bankruptcy, in order that substantial justice be done, are liberal in allowing amendments, especially to meet situations not covered by law or by rules of procedure. But it is going rather far to hold, that a court of bankruptcy, in its orderly administration of justice, will reach into its general equity powers and find a means to restore

to a person a right which is conferred upon him by statute and which he has lost by his own neglect."

. . .

"It thus appears that the statute confers the right to a review, the general order defines the procedure, and the rule of court prescribes the time within which the proceeding shall be commenced. The general order and the rule of court have the force of law. From the statute, the general order and the rule, a rule of law has developed to the effect, that unless a party objecting to an order shall himself prosecute a petition to review, setting forth the . . . errors he complains of, within the time prescribed, he may not thereafter file on his own behalf a petition to review (except upon leave of the court), nor will he be heard to complain of a referee's order on petition to review filed by another party."

To the same effect is the holding of the case of *In re David*, 33 Fed. 2d: 748, where it was held at page 749:

"Long practice under this rule and like rules of other courts has demonstrated that the time is reasonable. Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the District Court is exclusive. *In re Greek Mfg. Co.* (D.C.) 164 F. 211; *In re Marks* (D.C.) 171 F. 281.

"The petitions are dismissed."

D.

**DISCUSSION RE AUTHORITIES ON SPECIFICATION
OF ERRORS.**

Under this portion of petitioner's brief he has listed fifteen alleged errors, many of which have no application whatsoever to this proceeding, many are clothed partly in fact and partly in the imagination of counsel. Whether this is done by design or not is beside the point. It, nevertheless, is confusing and if we attempted to answer each one specifically and point out the various discrepancies in each this brief would run far beyond its present limitations.

May we call the Court's attention at this time to the fact that under the law the petitioner in this proceeding before this Court can raise no question or questions other than those presented to the Circuit Court of Appeals.

Sonzinsky v. U. S., 300 U. S. 506.

With the idea of reducing this brief to the answering of the limited issues as above defined we will point out the portions in our brief herein where each of the material issues herein are discussed under the subheads below.

Petitioner's Assignment of Error 1.

The matter alleged in this error was considered by the Circuit Court of Appeals, and is hereinafter discussed under our subheading I below.

Petitioner's Assignment of Error 2.

This assignment, as phrased by petitioner, was not discussed in the original proceeding. The first part of this

assignment was within the purview of the original decision but he has added to that part the following:

“And the *entire proceeding* having been considered by the Conciliation Commissioner” (Petitioner’s brief p. 11).

The entire proceedings were not considered by the Conciliation Commissioner. However, we will treat the material part of this assignment under subheading II hereof.

Petitioner’s Assignment of Error 3.

Under this assignment he sets up the question of a *void order*. There is no finding or discussion in this proceeding of any *void order*. This is purely counsel’s own conclusion. Again the material portion of this assignment of error is hereafter discussed herein under our subhead II, page 41.

Petitioner’s Assignment of Error 4.

This assignment adds matters which were not discussed by the Circuit Court of Appeals by the adding of this language:

“Regardless of when such petition for review is filed” (Petitioner’s brief, page 11).

We disbelieve that the Circuit Court of Appeals held that if the petition for review had been filed within the ten days the Court would not have had jurisdiction. This assignment of error is, therefore, a distorted and untrue statement of the decision.

Petitioner’s Assignment of Error 5.

There is no holding of the Circuit Court of Appeals that 39-C is a statutory limitation and not a rule of procedure.

Petitioner's Assignment of Error 6.

There is no comment in the Circuit Court of Appeals' decision on Section 2(10).

Petitioner's Assignment of Error 7.

The Circuit Court of Appeals' decision did not state that Section 39-C was or was not a limitation of Section 38.

Petitioner's Assignment of Error 8.

There is nothing in the proceeding to signify that the Conciliation Commissioner considered the whole proceeding. (See discussion at pages 25 to 27 *Supra.*)

Petitioner's Assignment of Errors 9 and 10.

These specifications are hereinafter answered by the respondents herein under our subhead II hereof.

Petitioner's Assignment of Errors 11, 12 and 14.

The question of the length of the stay in these specifications mentioned was not up for judicial determination by the Circuit Court of Appeals. It was not decided, and therefore, no error can lie.

Petitioner's Assignment of Error 13.

This assignment falls within the same scope as Errors 11 and 12. The Court was not called upon to pass upon, the perishability of the property in question, nor is this Court required to pass upon this phase of the question. It is not here for determination.

Petitioner's Assignment of Error 15.

He has inserted into this assignment of error the following false premises:

"when proceedings for obtaining such review had been perfected by the filing of a petition for review"

and by the insertion of the wording:

"all in compliance with Section 39-C"

However, this error, as the competent parts thereof may apply to this case, are discussed herein under E subhead II.

E. RESPONDENTS' FIVE POINTS.

It is a fundamental proposition of law that the only proposition which a Court can decide in a matter are the propositions raised by the parties, and which are necessary for a proper determination of the proceeding. The following are the only points which the Circuit Court of Appeals considered, and the only propositions upon which possible errors might be assigned. These are as follows:

1. Section 39C and not Section 75S of the Bankruptcy Act governs the time for filing petitions for review of the orders of Referee in former debtor cases (R. 209).
2. Petitioner not having filed any petition for review within the time prescribed by Section 39C, and having lost his right to review thereunder, did not revive that right by the subsequent filing of the petitions for re-hearings of the orders of August 13, 1940 and September 7, 1940.
3. Petitions for re-hearing having been filed merely for the purpose of attempting to revive and extend this right to review, the court correctly dismissed such petitions for review.
4. Orders of September 7, 1940 are consent orders. No appeal or review by petition for review can be had thereto.
5. Order of August 13, 1940 is a consent order. No appeal or review by petition for review can be had thereto.

As we shall hereinafter point out the authorities sustain the holding of the Circuit Court of Appeals and each of the petitioner's contentions are without merit.

Some of the points hereinafter stated will no doubt be repetitious but we respectfully ask the Court to bear with us in our effort to answer the petitioner's assignments of error.

I.

Section 39C. and not Section 75S of the Bankruptcy Act governs the time for filing petitions for review of the orders of Referee in farmer debtor cases.

The real issue presented to the Court in this case is whether the District Court erred in dismissing the petitions for review of the orders of the Referee entered on August 13, 1940 and September 7, 1940, for the reason that such petitions for review were not filed within the ten-day period as required under the provisions of Section 39C of the Bankruptcy Act. Especially is this true where no application for extension of this ten-day period was ever asked of or granted by this Court.

With the issues thus defined and established, we wish to quote the following extract from Section 75S of the Act itself:

"Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may *file objections, exceptions, and take* appeals within four months from the date that the referee approves the appraisal."

A reading of this section clearly indicates that this section deals solely with appraisals and does not involve any of the other procedural matters connected with this particular act. We call the Court's particular attention to the fact that nowhere in the above provision is there any reference to a review of the Referee's orders.

To further demonstrate that this section refers strictly to appraisals is the limitation that "either party may file objections, exceptions, and take appeals *within four months after the date the referee approved the appraisal.*"

Suppose these orders had been entered four months and one day after the Referee had approved the appraisals, would petitioner agree and would the court then hold that all right of review had been lost? This is too fallacious to warrant further discussion.

The purport of Section 75 of the Act cannot be clearly ascertained without a study of the Act itself and the general orders of the Supreme Court enacted thereon. A reading of both the Act itself and of the general orders of the United States Supreme Court make it clearly apparent that neither Congress nor the Supreme Court ever intended that Section 75 should contain all procedural limitations on matters arising under the act. In fact, in the quotation of Section 75 there is no limitation on petitions for review of referee's orders. The Supreme Court of the United States, under General Order L, Paragraph 11, appraised the incompleteness of this section when it adopted the following rule:

"In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section."

Congress itself in the act clearly signified that this section was not sufficient unto itself in procedural matters. It clearly manifested its intention that this act was to be administered in accordance with general bankruptcy procedure except as this section expressly provided to the contrary when it inserted the following language in paragraph 75 N:

"In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner, for the purpose of forwarding same to the clerk of court."

If this leaves any doubt as to the intention of Congress and the applicability of section 39C of the Bankruptcy Act in the Court's mind, we will call the following to the Court's attention.

The record in this case shows (R. 8) that farmer debtor on July 23, 1940 prior to the entry of the orders in question, amended his petition, asked to be adjudged a bankrupt under section 75 (s) and was on said date, viz., July 23, 1940, duly adjudicated a bankrupt.

The Act itself provides (75 (s) (4)) that after such adjudication the Commissioner shall continue to act and he shall then act as a referee and not as Commissioner;

"The conciliation commissioner, appointed under sub-section (a) of section 75 of this Act, as amended,

shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of sub-section (s) of section 75 of this Act; and continue so to act until the case has been finally disposed of."

Under the above provision of the Act, it is clear that Mr. Givler was on the date of the signing the respective orders acting as a referee; that his powers and duties, powers and the rights and liabilities of the parties to this record, whereas pointed out in Section 75 (n) on such dates the same as if farmer debtor had filed a voluntary petition in bankruptcy. Under General Order L, Givler's powers and duties were those of a referee in bankruptcy.

This being all true and section 75 carrying no inconsistent provision, section 39C of the Chandler Act must necessarily apply as to the date of the filing of petitions for review of referee's orders.

To hold that it did not and that section 75 was sufficient unto itself in this regard would be contrary to Congressional intention, and United States Supreme Court interpretation as shown above, and last but just as important to common sense, it would make all orders entered subsequent to four months of the approval of the appraisal final and impregnable to review, appeal or reconsideration.

The case of "*Sampayo v. Bank*, reported as *Benitez v. Bank of Nova Scotia*, 61 Supreme Court Reporter 953" cited by the farmer debtor states no difference or other rule. The only question presented to the court in that case was whether the definition of a farmer as set forth in section 75 (r) should govern in farmer debtor proceedings, or whether the definition of farmer appearing in Section 1, and (17) of the Chandler Act should control. The court simply held that the provision in Section 75

should apply since it is not changed by the revision, but the court clearly indicated that the very purpose of the Chandler Act was to make a comprehensive and careful revision of the bankruptcy law applied generally to all proceedings thereunder.

There is no question that the limitation provided by Section 39C for the filing of petitions for review is mandatory and has the force of law and must be complied with in order to perfect a petition for review. This is borne out clearly in the case of *In re David*, Third Circuit, 33 Fed. 2nd, 748, where it appears that at the time of such decision there was a rule of the court which required that all petitions for review of an order of a Referee in a bankruptcy case must be filed within ten days after such order; (this in substance is the same as the present Section 39C of the Bankruptcy Act); and in holding that the time specified by such rule is mandatory, the court said at page 749:

“Long practice under this rule and like rules of other courts has demonstrated that the time is reasonable. Should a person fail to observe the rule—which is what happened here—he will of course forfeit the advantage which, by observing it, the rule affords him. Of this advantage he cannot later avail himself by a writ of certiorari, appeal or other indirect process, for the method of reviewing an order of a referee, prescribed by General Order 27 and the supplemental rule of the District Court is exclusive. *In re Greek Mfg. Co.* (D. C.) 164 F. 211; *In re Marks* (D. C.) 171 F. 281.

“The petitions are dismissed.”

This case, *In re David*, aforesaid, was cited with approval and upheld (contrary to petitioner's argument and contentions) in *In re Miller*, *Miller v. Hatfield*, 111 Fed. 2nd,

28, at 34. We would also like to point out that the *Miller* case last mentioned involved a farmer-debtor proceeding under Section 75.

Petitioner in his brief has cited various Sections of the Bankruptcy Act and has, in his brief, inserted isolated sentences from various Federal Courts. With his several citations as quoted, we have no argument, but he has isolated various statements of the courts which, if read with the balance of the decision, will not bear out the contention he makes, and the cases themselves, when the entire decision is read, support the contentions of the respondents herein. We will not attempt to analyze all of these decisions. We have hereinabove set forth the true and correct rule of law.

II.

Petitioner not having filed any petition for review within the time prescribed by Section 39C, and having lost his right to review thereunder, did not revive that right by the subsequent filing of the petitions for re-hearings of the orders of August 13, 1940 and September 7, 1940.

Having set forth that the order of August 13th and the orders of September 7th became final on the 10th day after their entry, the remaining proposition is, was the finality of these orders destroyed by the subsequent filing of the untimely petitions for rehearing, which were not entertained but were denied by the Court? Before going into a discussion of this matter it must be remembered that the farmer debtor failed to file a petition for review of the order of August 13, 1940, and also failed to file such a petition for review of the three orders entered on September 7th, 1940, within the ten days as required by Section 39C of the Bankruptcy Act.

Important is the fact, ~~that~~ the farmer debtor did not apply for an extension of time in which to file his petition for review, as required by Section 39C.

It is admitted by the petitioner that the petitions for rehearing filed by him were not filed until after the expiration of the ten day period of limitation for filing a petition for review. It is further admitted by the petitioner and sustained by the record that after the denial of the respective petitions for rehearing then, for the first time, did the farmer debtor file his petitions for review. It further cannot be denied that both petitions for rehearing were by the Referee denied. For further particulars we respectfully refer the Court to the concise statement of facts herein set forth.

Upon these admitted facts the Circuit Court of Appeals, and the District Court, properly held that the petitions for rehearing did not revive or extend the time for filing petitions for review. These conclusions are sustained by the following authorities:

“Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. *When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could*

be, the law which limits the time within which an appeal can be taken would be a dead letter.' *Credit Co. v. Arkansas C. R. Co.*, 128 U. S. 258, 261, 32 L. ed. 448, 449, 9 Sup. Ct. Rep. 107, 108." (Italics are ours.)

Conboy v. 1st National Bank, 203 U. S. 141 at 145, 51 L. Ed. 128 at 130.

The rule as announced by this Court in the *Conboy* case has never been departed from. Counsel would try to make this Court believe that this rule was changed by the decision of this Court in *Wayne United Gas Company v. Owens Illinois Glass Company*, 300 U. S. 131; *United States v. Seminole Nations*, 299 U. S. 417; *Gypsy Co. v. Escoe*, 275 U. S. 498; *Morse v. U. S.*, 270 U. S. 151, and *Bourman v. Lopereno*, 311 U. S. 262; but such is not the fact. Each one of these cases affirm the rule as laid down in the *Conboy* case.

So that the Court may be advised of the correct status of the present law and the gist of decisions subsequent to the *Conboy* case, we will briefly point out wherein the subsequent cases do not change the established law, but in fact affirm it.

In *United States v. Seminole Nations*, 299 U. S. 417, there were two sections under which petitions for rehearing might be filed. Section 350 limited the time to three months after the entry of the order under 28, U. S. C. A. 282, which rule provided that such petition might be filed any time within two years on motion on behalf of the United States. The record does not show any motion granted and the Court there held:

"On this record it is reasonably believed to be inferred, and we find, that the second motion was one filed in accordance with the rule under which application for leave was necessary and not one authorized

by statute for the filing of which permission of the Court was not needed. It is correctly stated that the three months' period did not commence to run until the Court disposed of that motion and did not expire until long after the defendant had filed its petition for this writ."

Therefore, the petition was filed in time.

Wayne v. Owens Illinois Glass Co., 300 U. S. 131.

In this case, the Court found there was sufficient reason to reopen the case and granted a new trial of the matters involved and granted the petition for rehearing, reopened the case and heard the matter on its merits and entered a new judgment. This is not the fact in the case at bar. The distinction here is clear and brings it within the exceptions mentioned by the Circuit Court of Appeals in its opinion.

Bowman v. Lopereno, 311 U. S. 262.

In this case the petition for review was filed within the time required and certified to the District Court, clearly bringing it within the distinction mentioned in the Circuit Court of Appeals' opinion in this case. In the *Bowman* case, the order complained of was the order of adjudication of bankruptcy which remained in abeyance in the District Court until October 25, 1937, at which time the order was confirmed. On November 15, being within the thirty-day appeal time, petition for rehearing of this order was asked, in which it was requested that the order of adjudication be vacated and set aside. On February 17, 1938, the petition for rehearing was heard and denied, and on March 18, 1938, the order of February 17, 1938 was appealed to the Circuit Court of Appeals. It will be

observed that the petition for review was filed within the period prescribed by law which is not the situation in the case at bar. This latter case was cited to the District Court after the District Court had made its original decision in this matter. Judge Holly reconsidered his former order and asked parties hereto to procure for him briefs filed in this Court in the *Bowman* case and after considering the briefs then filed by counsel in this Court in the *Bowman* case, reaffirmed his original order and denied the motion to reconsider. In the *Bowman* case, appellant's brief specifically set forth that they were mindful of the rule that when preparing the petition for rehearing and the filing of the appeal, that the right of appeal once lost, could not be revived by petition or motion for rehearing.

Gypsy Oil Company v. Escoe, 275 U. S. 498.

In this case the petition for rehearing was filed within the period within which an appeal could be allowed and is therefore within the exceptions mentioned in the Circuit Court of Appeals' decision.

Morse v. U. S., 270 U. S. 151.

Although the petitioner contends that the case of *Morse v. U. S.*, *supra*, bears out his contentions, it will be noted from an examination of that case, that a motion for new trial was filed and overruled and a motion for a second new trial was filed after the time for leave to appeal had expired, which motion for new trial was likewise denied. The Court there held that there was no suspension of the running of the time for appeal and that the suspension of the running of the period limited for the allowance of an appeal after a judgment had been entered depended upon the due and seasonable filing of the motion.

In arriving at this decision, this Court considered the following United States Supreme Court cases:

Andrews v. Virginian, 248 U. S. 272

Aspen v. Billings, 150 U. S. 31

Chicago v. Basham, 249 U. S. 164

Kingman v. Western, 170 U. S. 675

Memphis v. Brown, 94 U. S. (4 Otto) 715

Texas v. Murphy, 111 U. S. 488

United States v. Ellicott, 223 U. S. 524

Washington v. Bradley, 19 L. Ed. 894

These very cases have been cited by the petitioner as bearing out his contention.

An examination of the *Conboy* case, *supra*, will disclose that the following cases cited by the petitioner in his brief filed herein, viz:

Brockett v. Brockett, 2 How. 238, 11 L. ed. 251

Aspen v. Billings, 150 U. S. 31

Texas v. Murphy, 111 U. S. 488

Kingman v. Western, 170 U. S. 675

were also cited by the petitioner in the *Conboy* case. Yet the Supreme Court, by its decision, in effect held that these decisions did not control since the petition for rehearing had been denied. This is conclusive against the persuasiveness of these cases cited by the petitioner. In *Chapman v. Federal Land Bank*, 117 Fed. 2d, 321, the facts under consideration closely parallel the case at bar, and in that case that Court commented on the *Conboy* case and discussed *Morse v. United States*, 270 U. S. 151; *Wayne Gas Company v. Owen Company*, 300 U. S. 131, and arrived at the same conclusions as this Court did in the *Conboy* case above.

The proposition of law as contended by us hereunder has also been followed by the various Circuit Courts of Appeals in the following cases:

C. M. & St. P. R. R. Co. v. Leverentz, 19 F. 2d 915.

Chapman v. Federal Land Bank, 117 F. 2d 321.

McIntosh v. U. S., 70 F. 2d 507.

Clark v. Hot Springs Electric Light & Power Co.,
76 F. 2d 918.

N. W. Public Service Co. v. Pfeifer, 36 F. 2d 5.

Larkin Packing Co. v. Hinderliter, 60 F. 2d 491.

Minz v. Lester, 95 F. 2d 590.

International Agriculture Corp. v. Cary, 240 Fed.
101.

In re David, 33 Fed. 2d 748.

In re Albert, 122 Fed. (2d) 393.

In re Miller (Miller v. Hatfield), 111 Fed. (2d) 28
at 32.

In re Wister & Co., 237 Fed. 793.

We find the correct rule hereon so clearly stated in a Circuit Court of Appeals case that while this is from an inferior Court, the language therein contained is so aptly set forth that we desire to quote therefrom the following:

“Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court’s judgment thereon. If the court shall grant the motion, a new trial will follow. *If the court shall deny the motion, there is no remedy.* The privilege of presenting a motion for a new trial and of having it heard and determined on its merits even after the time within

which to sue out a writ of error has expired, is a valuable right."

C. M. & St. P. Ry. Co. v. Leverentz, 19 Fed. 2d 915.

This is a common-sense rule of procedure which follows the doctrine of the *Conboy* case.

III.

Petitions for rehearing having been filed merely for the purpose of attempting to revive and extend the right to review, District Court correctly dismissed such petitions for review.

The record in this case, and especially the opinion and decisions of the Referee herein (R. 109) and (R. 158), as well as the opinion of the Circuit Court of Appeals, clearly show that they considered the petitions for a re-hearing herein were filed not with any hope of ever obtaining a re-hearing of the matter before the Referee, but solely for the purpose of reviving the time for appeal which had been expired.

This Court, in *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, clearly indicates that it will not tolerate or permit a revival of such right under such circumstances.

"A defeated party who applies for re-hearing and does not appeal from the judgment or decree within the time for so doing, takes the risk that he may lose his right of appeal as the application for re-hearing, if the court refuses to entertain it, does not extend the time for appeal. *Where it appears that a re-hearing has been granted only for that purpose the appeal must be dismissed.*"

Wayne United Gas Co. v. Owens-Illinois Glass Co.,
300 U. S. 131 at 137; 25 L. Ed. 557 at 561.

IV.

Orders of September 7, 1940 are consent orders. No appeal or review thereof by petition for review can be had therefrom.

In addition to what we have heretofore said, these three orders are further impregnable to appeal for the additional reason that these orders were entered on the express consent and stipulation of the farmer debtor.

The record filed herein shows that:

Coulson was the attorney of record for the farmer debtor and, as such, attended all hearings for him before the Commissioner; he was one of the attorneys of record who signed the amended petition for the debtor (R. 26). He was present in court on July 25, 1940 and made a motion setting all matters including the petitions of these Three Creditors for hearing on August 13, 1940 (R. 8). On August 13, 1940, at the hearing on the petitions on which these orders complained of were entered, petitioners had their witnesses in court, sworn and were about to proceed with their proof, when debtor's counsel voluntarily waived such proof (R. 102-111) and without solicitation from these three appellees voluntarily entered into the following stipulation of record:

"Hearing on Reclamation Petition and *stipulation by debtor* and each of the following claimants: Hartman and Son, Northern Illinois Finance Company and the Algonquin State Bank, that the personal property described in the petitions is perishable within the meaning of Paragraph 2, Subsection S of Section 75 of the Bankruptcy Act; it is further stipulated that the property described in the Reclamation Petition is not at this time claimed by the debtor as exempt property." (See R. 10.)

After this stipulation was made of record, said petitions and proceedings were then continued for a period of 20 days (August 13 to September 7), (R. pages 9 and 10), giving debtor and his counsel that additional time to weigh the effect of this stipulation and withdraw it or make such changes as they saw fit. Some discussion of debtor's affairs between him and his counsel must have transpired during that period because *debtor himself* and additional counsel (one U. G. Ward) appeared at the hearing of September 7th. The orders complained of were entered on that date in the presence of debtor's two lawyers and himself, and he was given "full opportunity to indicate his position before the entry of such order of sale" (R. 113). Debtor is a very intelligent man, having been at one time President of the Pure Milk Association (R. 115). He must be held accountable for what transpires in his presence, namely the entry of the orders of September 7th and the purport thereof.

These facts are conclusive that the debtor authorized the stipulation prior to the hearing of August 13 and confirmed it at and prior to the date the orders in question were signed. To hold otherwise would be a travesty on proceedings in Federal Courts.

"It can never lie with a litigant, either by passive consent or by affirmative action, to lead a court to find a fact justified and fit to be carried into judgment and then to contend in another court that the same fact at the same time and within his own knowledge was otherwise and competent to support a contrary judgment. A consent decree within the purview of the pleading and the scope of the issues is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. *A statement in a record on appeal that a party has consented to a decree, is equivalent to an admission that the facts exist*

on which the decree rests, and the only question open is whether that decree could be entered in that cause or on any state of facts. (*Pac. R. Co. v. Ketchum*, 101 U. S. 289, 296, 297; 25 L. Ed. 392; *United States v. Bab-bitt*, 104 U. S. 767, 26 L. Ed. 921; *Gauss v. Goldenberg*, 39 App. D. C. 597, 599.) And this principle has long been established in English courts where a decree taken by consent cannot be set aside by a bill of review, or a bill in the nature thereof except for clerical error or for something inserted but not consented to. 2 David ch. pr. 1576. Or as the Lord Chancellor put it in the time of Charles II, *there can be neither legal error nor injustice in a consent decree.* (*Webb v. Webb*, 3 Swanst 656.) (Italics are ours.)

Curry v. Curry, 79 Fed. (2d), 172.

"A consent decree is not a judicial determination of the rights of the parties. It does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent cannot be reviewed by appeal or writ of error." (*Paine v. Doughty*, 251 Ill. 396; *Galway v. Galway*, 231 id. 217.) (Italics are ours.)

Bergman v. Rhodes, 334 Ill. 137 at 143.

"It is a well settled general rule, declared in some states by express statutory provision, that a party is not aggrieved by a judgment, order, decree or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore *he cannot appeal or sue out a writ of error to review the same*, even though there has been an attempt to reserve the right to appeal, and even though the consent order was not authorized by the pleadings.

"Under this general rule, a party generally is estopped or waives right to appeal or bring error when

a judgment, order or decree was entered on his motion, offer, or admission or at his request or in conformity with facts admitted by him." (Italics ours.)

4 C. J., Secundum, 404, Sec. 213.

Debtor only attended two of the several hearings had herein before the Commissioner (R. 114), and his chief counsel, Mr. Dazey never appeared (R. 109). This in spite of the fact that the Commissioner repeatedly requested their presence at hearings (R. 114). Much is made of Dazey's physical condition but as is pointed out (R. 114-115) he became ill on May 21, more than a month prior to the first hearing and more than four months prior to the entry of the orders of September 7th. If he could not care for his practice, he owed the duty not only to his client but to the court to either engage other competent counsel or to withdraw from the case entirely. His conduct in trying to ruin the career of a young attorney (Mr. Coulson) by calling him a "Water boy" and blaming him for admissions apparently made with full knowledge and acquiescence of debtor, are, to say the least, not commendable to such learned counsel as Mr. Dazey is portrayed to be.

The acts, stipulations and conduct of litigation by debtor's counsel of record are the acts, stipulations, and conduct of debtor himself.

"A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the Company assented thereto, through its solicitors."

Pacific R. R. Co. v. Ketchum, 101 U. S. 289 at 296;
25 L. Ed. 932 at 935.

U. S. v. Babbitt, 104 U. S. 767; 26 L. Ed. 921.

It is certain that this stipulation was authorized because the order, prior to entry thereof and after the stipu-

lation, was discussed in debtor's presence and no question raised, and the record so shows.

"Where an attorney is the counsel of record for a client, his agreement and the conduct and management of the litigation must be considered as the agreement of his client, and if any of his acts are without sufficient authority as between him and his client, the remedy of the client is against his counsel." (Italics are ours.)

Bergman v. Rhodes, 334 Ill. 137 at 142.

"When one puts his case in the hands of an attorney, it is a reasonable presumption that the authority conferred includes such actions as the attorney, in his superior knowledge of the law, may decide to be legal, proper, or necessary in the prosecution of the suit, and consequently whatever adverse proceedings may be taken by the attorney are to be considered binding upon the client. Attorneys may waive objections with respect to pleading, or fail to file proper pleas, make admissions of fact, and of necessity make disposition of many things that arise in and about the trial of cases."

Union Central Life Insurance Co. v. Anderson, 291

Ill. App. 423 at 36; 10 N. E. (2d) 46 at 52.

To the same effect see:

Clemens v. Gregg, (Cal.) 167 Pac. 294 at 297.

American Car Co. v. Industrial Commission, 335 Ill. 322.

V.

Order of August 13, 1940 is a consent order. No appeal or review by petition for review can be had thereunder.

What has been hereinabove argued and set forth as to the order of September 7, 1940, equally applies to the order of August 13, 1940. It will be borne in mind by the Court that the rentals provided for in this order were set within the range of amounts suggested by the debtor (R. 162 par. 6). The moratorium therein suggested was fixed at the dates suggested by the debtor (R. 68).

F. CONCLUSION.

Debtor lost his right to have the orders in question reviewed by the District Court on the tenth day following the entry of same, he having filed no petition for review thereof. This right of review was not revived by the filing of the alleged petitions for rehearing before the Referee herein. No request having been made for an extension of time as provided in Section 39-C or granted by the Court, the District Court correctly dismissed the petitions for review filed by the debtor therein, and the Circuit Court of Appeals correctly sustained such action of the District Court in so doing.

The orders of September 7 are consent orders and no appeal or review thereof is permissible.

The order of August 13 was entered at the request and in conformity with suggestions of the debtor, and they thereby also become consent orders and are not reviewable or appealable.

The decision of the District Court and of the Circuit Court of Appeals in this case is in conformity with the

long-established and recently confirmed rules of law as laid down by this court and their action herein should be sustained.

In conclusion may we again call the Court's attention to the fact that this appeal involves two separate cases, each of which is independent of the other and both of which have been consolidated for the purposes of appeal only.

Respectfully submitted,

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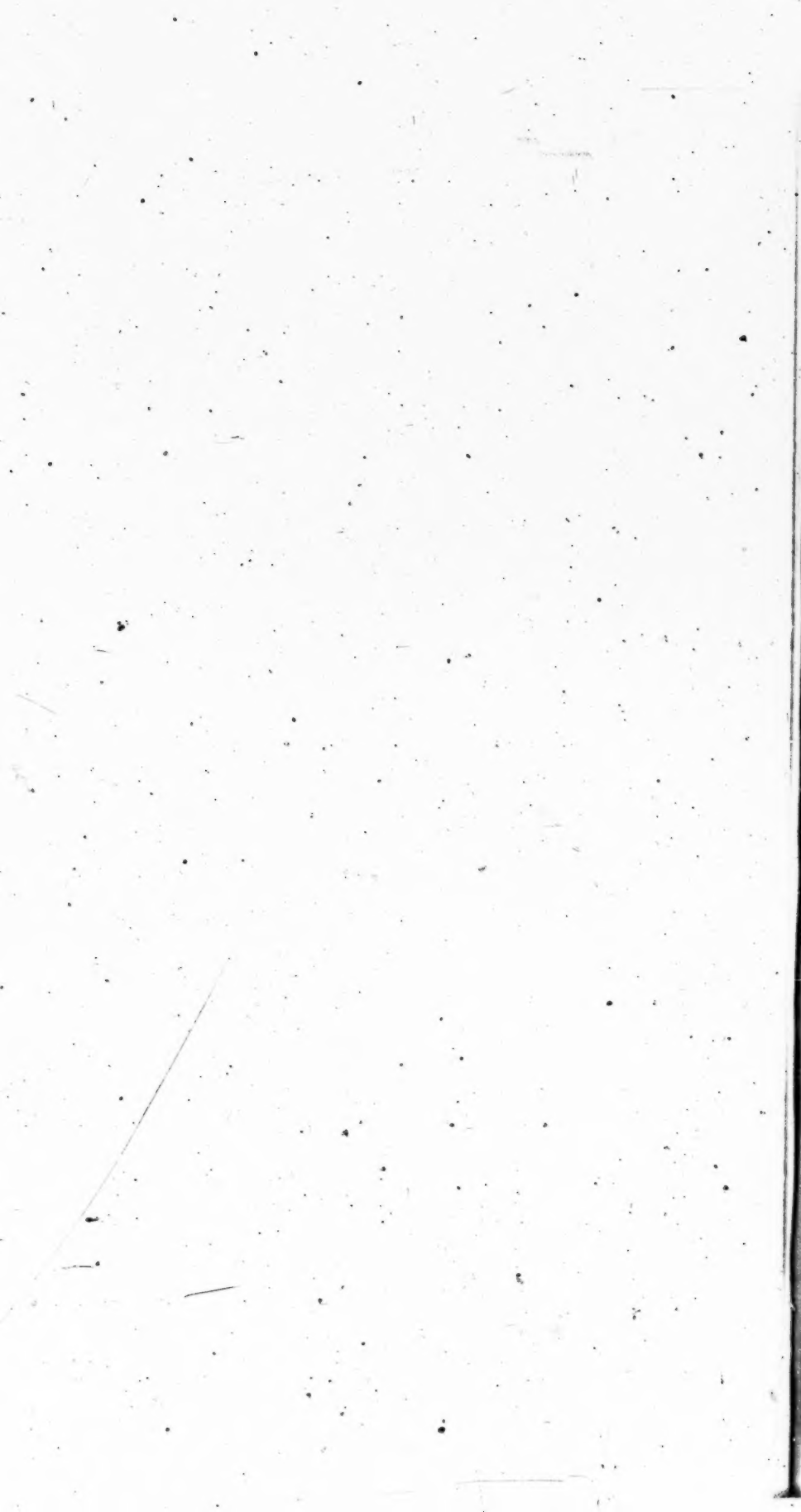
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FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 26

HENRY ANTON PFISTER, Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN
STATE BANK, HARTMAN AND SON, et al.

No. 27

HENRY ANTON PFISTER, Petitioner,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN
STATE BANK, HARTMAN AND SON, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

NOTE: All emphasis in this petition for rehearing is
supplied.

*To the Honorable Justices of the Supreme Court of the
United States:*

The petitioner respectfully presents his petition for
rehearing:

I.

A Sense of Responsibility,

In presenting this petition for rehearing counsel for the petitioner is impelled by a sense of responsibility growing out of his experience in the cases of *Wright v. Vinton*, 1937, 300 U. S. 440, and in *John Hancock v. Bartels*, 1939, 308 U. S. 180. The first upheld the constitutionality of Section 75(s), the farmer debtor law. Unfortunately its effect was blacked out by "Note 6" of the opinion which asserted that farmer debtor proceedings might be dismissed for "lack of good faith" or because there was "no hope of rehabilitation." The note cited some sixteen decisions of this and of the lower courts.

The point at issue, constitutionality, having been decided, the potential import of Note 6 was not made the subject of a petition for rehearing. For more than two and a half years thereafter mortgage holders continued to secure dismissals of farmer debtor cases by filing motions based on this Note 6. Thousands of farmer debtors thereby lost titles to their farms, for the total effect was not measured by the farmer debtor cases actually dismissed, but by the success of pressure from mortgage holders upon financially involved farmers who could secure no relief from a farmer debtor petition.

During that period counsel for this petitioner argued in many courts that Note 6 was not the law because (1) the decisions it cited did not sustain it, (2) because the statute did not support it, and (3) because it was not germane to the issue. It was not until certiorari was granted in the *Bartels* case (after certiorari had been denied in several intervening cases) that an opportunity was again

afforded to present to this court the erroneous Note 6. Upon the same arguments presented without success to the lower courts in the intervening two and one-half years, this court then held in Note 3 at page 184 of the *Bartels* opinion that "What is said upon this point in Note 6 in *Wright v. Vinton*, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the Statute." From that time the mortgage holders relegated their combat tactics to other grounds.

II.

Simplification of Discussion.

In order to simplify the discussion all References to methods of review are styled "appeal," whether the particular case included a writ of error, a petition for certiorari, an appeal, or any other form of review.

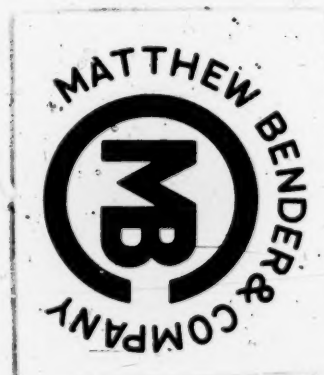
Also because there are no terms in a court of bankruptcy there will be no reference to whether an application for rehearing was filed within or after term unless there is some particular reason for doing so. This court has made this very clear when it said:

"Though a court of bankruptcy sits continuously and has no terms, respondents urge that, as courts of bankruptcy are courts of equity, the rules applicable to the rehearing of a suit in equity shall be applied in bankruptcy cases"

"But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, **limited** by the expiration of the term at which

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the judgment or decree was entered and **not by the period allowed for appeal** or by the fact that an appeal has been perfected. **There is no controlling reason** for denying a similar power to a court of bankruptcy or **for limiting its exercise to the period allowed for appeal."**

Wayne v. Owens-Illinois, 300 U. S. 131, at pages 136 and at 137.

III.

The Issue.

The opinion, on the first page of the printed leaflet form, succinctly states the **issue** and "other questions . . . which may be fairly subsumed" in these words:

"The issue.

A conflict of circuits as to whether the ten day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal, impelled us to grant our writ."

This was plainly the issue, and the sole issue, brought to this court, because:

1. The only ground of the final decree of the District Court in each case was that "this court is **without jurisdiction.**" R. 175, R. 177. The reason given was that the petitions for review were filed more than ten days from the dates of the orders to which they respectively related.
2. The appellate court affirmed the District Court, saying: "The District Court followed the Statute and it had **no power to do otherwise.**" R. 214. The statute referred to is Section 39 (e) of the Bankruptcy Act which names ten days for the filing of a petition for review.

This court decided this issue in favor of the petitioner. At page 3 of the opinion it is said, referring to the appellate court's decision that the petitions for review being filed after ten days "were not filed in time" and therefore the District Court had no jurisdiction, "we disagree with the Court of Appeals upon the last ground upon the assumption that the language meant that the District Court was without 'power' to review the orders."

There, we respectfully urge, the opinion should have ended by reversing the judgment. On the contrary this court affirmed it on three "subsumed questions."

The "subsumed questions."

These are stated on pages 1 and 2 to be:

(1) Whether Section 75(s), four months, or Section 39(c), ten days, prescribes the time for filing a petition for review in former debtor proceedings.

(2) Whether the period for seeking review is extended when a petition for rehearing is entertained and denied.

(3) Whether a stay order under Section 75(s)(2) for less than the statutory three years is lawful.

As to the court's decisions on questions 1 and 3 (1, that Section 75(s) relates only to appraisals and 3, that the petitioner having asked for two years, eight months and thirteen days, he can not object) the petitioner raises no present objection. This court has spoken upon a subject in which there was no precedent.

However, upon question 2 (that a petition for rehearing entertained and denied does not toll or suspend the finality

of an order for appeal) your petitioner presents the uniform history of the decisions of this court over a period of nearly one hundred years which have firmly established the rule that a petition for rehearing which is entertained, that is considered, and denied, dates the time for seeking appeal from the denial and not from the original entry of the order. All phases of the rule have been so thoroughly, repeatedly, and consistently explored by this court and sustained against all objections, over a period of nearly a hundred years, that if this opinion is now the law, then a principle of law that has been universally followed ever since there has been an American Jurisprudence is now reversed. Henceforth we follow an entirely new course fraught with serious consequences if the opinion stands and so long as it stands. The reason is that a litigant can not know, until the end of a series of pleadings and hearings whether the rule is to operate.

IV.

An examination of the opinions of this court on the established rule that:

A petition for rehearing of an order which is entertained and denied suspends the finality of the order for the purpose of appeal and the time for appeal runs from the denial.

1. *Brockett v. Brockett*, 1848, 43 U. S. (2 How.) 238.

Time for appeal ten days. Petition to reopen filed **after** time for appeal. The court refused to reopen the decree and an appeal was taken.

A motion was made in this court to dismiss the appeal upon the ground that it was filed out of time.

Page 240: "And the court then refused to open the final decree." That is, the court of the first instance merely **entertained** the application for rehearing and denied it which this court held sufficient to suspend the time for filing an appeal. This court further said: "The court took cognizance of the petition and referred it to a master commissioner . . . and the court then **refused to open the final decree** . . . the final decree of the 10th of May was suspended by the subsequent action of the court and it did not take effect until the 9th of June." The original decree was not set aside. There was merely a denial of the motion to reopen it.

2. *Wylie v. Cox*, 1853, 55 U. S. (14 How.) 1.

In referring to the *Brockett* decision this Court clearly indicated that the *Brockett* decision required only that a court shall **entertain** an application for rehearing in order to suspend the time for appeal. This court said, page 2:

"In that case before any appeal was taken a petition was filed to open the decree . . . the court refused to open the decree and the party thereupon appealed . . . from the original decree and gave bond . . . This bond was given within ten days after the refusal of the motion but was more than a month after the original decree. And the court held that this appeal was well-taken . . . because the court regarded the original decree as suspended by the action of the court on the motion and that it was not effectual and final until the motion was overruled."

3. *Washington v. Bradley*, 1869, 74 U. S. (7 Wall.) 575.

The final decree was originally entered on February 6. The time for appeal was ten days. A motion to rescind the decree was filed out of time in twenty-six days. It was

denied on March 13 and the appeal was taken. This court said in referring to the various proceedings:

"We do not think it necessary to consider the effect of either of these proceedings; for on the 6th of March, as we understand, during the term in which the decree was rendered, **a motion to rescind was made on behalf of the plaintiffs and was heard and decided.**"

Referring to the date when the decree became final this court said "It became final in this case when **the motion to rescind had been heard and denied.**" The original decree was not set aside. The motion to set it aside was merely denied.

4. *Slaughter House Cases*, 1870, 77 U. S. (10 Wall.) 273.

The time for appeal was ten days. Petitions for rehearing were filed thereafter. Four weeks after the entry of the judgment rehearing was refused. This court said:

"Filed as the writs of error were, within ten days from the date of the entry **refusing the petition for rehearing**, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas and stay execution under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject but since the decision of the case in *Brockett v. Brockett* the question must be settled in accordance with the views of the plaintiffs."

The original judgment was not set aside or opened up. The petitions for rehearing were merely refused.

5. *Sage v. Central Railroad*, 1876, 93 U. S. (3 Otto) 412.

In interpreting its earlier decision in the *Brockett* case this court again said:

"The motion was one that could be made without leave and was **entertained**. . . . Under such circum-

stances the court held that the decree did not become final until the motion for rehearing was decided."

The motion in the *Brockett* case, it will be recalled, was merely denied, there was no setting aside of the decree.

6. *Memphis v. Brown*, 1877, 94 U. S. (4 Otto) 715.

After the time for a writ of error had expired, a motion was made to set aside the final order but the motion was denied. Again referring to its earlier *Brockett* decision this court said "Under the ruling in *Brockett v. Brockett* the motion . . . suspended the operation of that judgment so that it did not take final effect for the purpose of a writ of error until May 20 when the motion was disposed of", that is, by denying it. Here again the final order was not set aside. The motion to do so was merely denied.

7. *Cambuston v. U. S.*, 1877, 95 U. S. 502.

In discussing the rule, this court said: "In *Brockett v. Brockett* it was held that a petition for rehearing filed . . . and actually **entertained** by the court, suspended the operation of a decree in equity until the petition was disposed of". "Setting aside" was recognized as not a requirement.

8. *Goddard v. Ordway* (*Phillips v. Ordway*), 1880, 101 U. S. (11 Otto) 110.

An appeal had already been allowed before the motion to vacate the order was filed. In discussing what a court must do to "**entertain**" an application this court said:

"it is sufficient to say that the motion to vacate the order of affirmance and grant a rehearing **was made to and recognized by the court.** . . . This is evident from the fact that the motion was **entered on the minutes of the doings of the court** for the term. A paper may be filed in the proper office and yet not brought to the attention of the court while sitting in judgment but when what it calls for appears on the minutes of actual proceedings, it must be presumed that the court in some form gave it **judicial attention** and that it was presented in some regular way."

At another part of the opinion the court said: "The motion when **entertained** prolongs the suit and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding." Setting aside of the order is distinctly not required.

9. *Texas v. Murphy*, 1884, 111 U. S. 488.

The record did not show whether the application for rehearing was made before or after the expiration of the time for appeal. All that the record contained concerning the nature of the motion, its filing and its consideration and disposition by the court were the following words: "Motion of the appellant for a rehearing in this cause came on to be heard and the same having been considered by the court, it is ordered that the motion be overruled and the rehearing refused." The court said: "The record does not show in express terms when the motion for a rehearing was made but it was **entertained by the court** and decided on its merits". The nature of the consideration given to the motion for rehearing is indicated by the foregoing quotation from the record. This court further said: "In *Brckett v. Brckett* it was decided that a petition for rehearing presented in due season and **entertained by the**

court prevented the original judgment from taking effect as a final judgment for the purpose of an appeal or writ of error until the petition was disposed of". Again the court said: "It was expressly ruled in *Brockett v. Brockett* which has been followed in many cases since that if a petition for rehearing is presented in season and **entertained** by the court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of". The court then cites the *Slaughter House* cases, 77 U. S. (10 Wal.) 278, and *Memphis v. Brown*, 94 U. S. 717. There is no requirement that the subject order must first be "opened up" "vacated" or "set aside".

10. *Aspen v. Billings*, 1893, 150 U. S. 31.

After a final decree was entered an application for rehearing was filed. The record recites that the "motion for a rehearing of this cause having heretofore come on to be heard and having been submitted upon briefs" it was denied. This court held that the period for seeking appeal did not begin to run until the denial of the application for rehearing.

This court again stated the rule as follows: "The rule is that if a motion or a petition for rehearing is made or presented in season and **entertained** by the court the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then, the judgment or decree does not take final effect for the purpose of the writ of error or appeal". The court cited again *Brockett v. Brockett*, *Texas v. Murphy*, and *Memphis v. Brown*.

The court further said: "But it is said this can not be the result under either statute or rule of the mere filing of a motion or petition for rehearing and that it does not affirmatively appear in this case that the motion or petition was entertained by the court.

But we should be inclined to hold, if a decision in that regard was called for, that **since the application was passed upon** as having been duly made, the presumption must be indulged in that it was **entertained** by the court in the first instance" . . . Very clearly it is not required that the original decree must be set aside.

11. *Voorhees v. Noye*, 1894, 151 U. S. 135, 137.

On January 7 a decree was originally entered and a motion for rehearing was filed. Ten months later the following entry went on: "This cause coming on to be heard this day on the motion for rehearing filed herein, was argued and submitted to the court by solicitors for the respective parties; whereupon the court takes the same under consideration". An entry two months later showed that the motion for rehearing "on its merits was reargued and submitted to the court" and taken under advisement. The next entry denied the motion for rehearing, the court holding "that it is now too late to sustain said motion or to interfere with the decree". Upon such a record this court held that the original decree of January 7, a year previously "did not take final effect as of that date for the purposes of an appeal nor until February 17, 1892, because the application for rehearing was **entertained** by the court . . . and not disposed of until then". *Aspen v. Billings* was cited. Again it is clear that there was no setting aside of the order.

12. *Northern Pacific v. Holmes*, 1894, 155 U. S. 137.

An order was entered and the court granted leave to file a petition for rehearing. The petition for rehearing and an answer were filed. Two and a half years later an entry was put on in which the lower court recited: "said petition and answer having been taken under advisement by this court . . . the court being fully advised in the premises, denied said petition for rehearing".

This court said: "It is well settled that if a motion for petition for rehearing is made or presented in season and **entertained** by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal". *Aspen v. Billings*, and *Voorhees v. Noye* were cited. Here the finality of the decree for appeal was suspended two and a half years. The original decree was not set aside.

13. *Northern Pacific v. O'Brien*, 1894, 155 U. S. 141.

This court merely followed its decision in *Northern Pacific v. Holmes*, 155 U. S. 137, saying: "This case falls within that just decided and for the reason there given, the writ of error must be dismissed". That is, in both cases without setting aside the original order its finality was suspended against the running of time for appeal until a petition for rehearing was denied.

14. *Kingman v. Western*, 1898, 170 U. S. 675.

A judgment was entered and a motion to set it aside and for a new trial was filed. Thereafter the following entry was made: "This cause having been heard on the motion of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties whereupon after careful consideration thereof and being fully advised in the premises it is now on this day considered, ordered, and adjudged by the court that said motion be and the same is hereby overruled and that the judgment heretofore entered herein be and remain absolute".

An appeal was taken and a motion was made to dismiss it because it was out of time, reckoning from the date of the original entry of the judgment.

Discussing the subject of the effect of the application for rehearing, and especially referring to the point that no leave was obtained to file such an application for rehearing this court said: "No leave to file it was required as it was **entertained** by the court, argued by counsel without objection and passed upon. It must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or petition for rehearing is made or presented in season and **entertained** by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal". *Aspen v. Billings*, *Voorhees v. Noye*, *Brockett v. Brockett*, *Texas v. Murphy*, *Memphis v. Brown*, and *Northern Pacific v. Holmes* were cited.

Referring to the rule that with the ending of the term orders which have been entered within the term passed beyond the control of the court, this court said: "But this motion for new trial was filed in due course and in apt time during the term at which the verdict was returned and judgment rendered, and this being so, the case came within the exception."

In distinguishing between the rule that the denial itself of an application for rehearing is not subject to appeal, and the rule that such denial dates the finality of the order for appeal, the court said: "It is true that a writ of error does not lie from this court or the courts of appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jurisdiction over the case, and having power to grant the motion, the judgment is not final for the purpose of taking out the writ. The effect of a judgment, entered at once upon the return of a verdict, in other respects is not open for consideration. The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for a new trial. We do not think it is, and are of opinion that the limitation [for appeal] did not commence to run in this case until the motion for a new trial was overruled".

The original judgment was not set aside. A motion to do so was merely denied.

15. *Conboy v. First National* (1906), 203 U. S. 141, 146.

The District Court affirmed an allowance of claim in bankruptcy. The Circuit Court of Appeals affirmed January 23, 1905. Time to appeal to Supreme Court thirty days. ~~Petition to recall mandate filed April 25, 1905, was denied.~~ Petition for rehearing of the original affirmance was filed May 8, 1905, and denied May 24, 1905. Appeal allowed by a Justice of the Supreme Court May 27, 1905. The appeal was dismissed.

The opinion contains this statement at page 145: "

"The cases cited for appellant, in which it was held that an application for a rehearing made **before the time for appeal** had expired, suspended the running of the period for making an appeal, are not applicable when that period had already expired."

The cases cited do not support that statement. There were eight of them:

Brockett v. Brockett, discussed at page 6 of this petition for rehearing;

Aspen v. Billings, discussed at page 11 of this petition for rehearing;

Voorhees v. Noye, discussed at page 12 of this petition for rehearing;

Slaughter House Cases, discussed at page 8 of this petition for rehearing;

Washington v. Bradley, discussed at page 7 of this petition for rehearing;

Memphis v. Brown, discussed at page 9 of this petition for rehearing;

Texas v. Murphy, discussed at page 10 of this petition for rehearing, and

Kingman v. Western, discussed at page 14 of this petition for rehearing.

The total result of an examination of the citations referred to in the *Conboy* opinion just quoted is that in four of the cases (*Brocket v. Brockett*, *Washington v. Bradley*, *Slaughter House* cases, and *Memphis v. Brown*) the application for rehearing came **after time for appeal**. In one case (*Texas v. Murphy*) it is not shown when the application was filed, but time for appeal was sixty days and the application was disposed of in 126 days and the decisions cited and followed and the reasoning in the opinion were based on applications made after time for appeal. See the digest of *Texas v. Murphy*, at page 10 of this petition for rehearing. In the three other cases cited to the court in the *Conboy* case (*Aspen v. Billings*, *Voorhees v. Noye*, and *Kingman v. Western*) the application came within time for appeal.

It is very clear that the *Conboy* case was not properly presented for the cases rejected by the court were five to three against the decision. This court in *Wayne v. Owens-Illinois*, discussed at page 27 of this petition for rehearing, was justified in saying in Note 2 that the *Conboy* case "adverted to the question without deciding it."

The Appellate Court in this *Pfister* case at R. 213 made this statement:

"Appellant's petition for rehearing was filed merely for the purpose of reviewing and extending the time for filing a petition for review, under which state of facts the court in the *Wayne* case said an appeal should be dismissed. The leading case on this subject seems to be *Conboy v. First National Bank*, 203 U. S. 141, where the question is fully discussed."

Counsel for the petitioner has made a minute study of the *Conboy* case, including copies of papers in the files, eliciting the foregoing and the following facts about it.

Contrary to the statement from the opinion of the Appellate Court just quoted, the *Cowboy* opinion does not discuss the subject of a petition for rehearing filed merely to create time for appeal. If flatly decides that a petition for rehearing filed after time for appeal has expired does not extend the time for taking appeal. The nearest it comes to the subject of a petition for rehearing filed "merely" to extend time for appeal is in these words:

Page 145:

"Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing."

Here are the Facts:

January 23, 1905—Order of Circuit Court of Appeals affirming District Court.

February 20, 1905—This court decided *Western v. Brown*, 196 U. S. 502.

February 22, 1905—Thirty days for appeal expired.

April 25, 1905—Petition to recall mandate filed. This petition averred that the mandate had issued without notice, that on hearing of it the appellant, a trustee in bankruptcy, called a meeting of the creditors on March 3, 1905, to be held March 30, 1905. That while the creditors' meeting was pending he heard of the decision of this court in *Western v. Brown*, 196 U. S. 502, which established a different rule of applicable law.

May 8, 1905—Petition for rehearing filed, setting up the applicable rule announced in *Western v. Brown*, 196 U. S. 502, decided February 20, 1905, and published March 15, 1905.

Now as the decision in *Western v. Brown*, 196 U. S. 502, was not announced until February 20, 1905, and published March 15, 1905, it could not be said that the appellant could have made his application for hearing "and had it determined within thirty days and still have had time to take his appeal." The fact is that the *Conboy* decision is a lonely minority among the numerous decisions made long before and since holding the opposite.

16. *U. S. v. Ellicott*, 1912, 233 U. S. 524, 539.

A judgment was entered and a motion for a new trial was filed, argued and later overruled more than a year thereafter. A motion to dismiss the appeal was denied. This court said: "The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgment or decrees, is, we think, applicable to judgments or decrees of the court of claims and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when **entertained** by the court has been disposed of; and the time for appeals begins to run from the date of such disposition". *Kingman v. Western* and *Texas v. Murphy* were cited. The original judgment was not opened up or set aside.

17. *Andrews v. Virginia*, 1919, 248 U. S. 272.

Here again the question was when a judgment became final on appeal. Following judgment in a state court and after term, a petition for a writ of error was presented to the highest state court and later denied. The case was then brought into this court by writ of error. Because of a federal statute the jurisdiction of this court depended upon when the state judgment became final for appeal.

The opinion is important because it discusses the reason for the rule that the application for rehearing of an order when entertained suspends the finality for appeal until it has been disposed of. The opinion explains why it is the **existence** of the power to vacate the original order and not its **exercise** that operates the rule. It clearly shows that this court has already considered and rejected the **unworkable theory** that it is **the character of the final action of the court** upon that application and not the **entertaining** of it at the outset which determines whether the time for appeal is to date from the original entry or from the date of the entry showing the action of the court thereon.

The situation in this *Andrews* case was that after a judgment was entered by a lower court, the characteristic of its finality or its suspension depended upon an unknown factor, namely whether or not the reviewing court should notice it and thereafter assume jurisdiction to review. According to the argument of the respondents in that case, which is exactly parallel to the argument which would support the opinion in this *Pfister* case on the point under discussion, if the upper state court did not take jurisdiction, then the original order was final at the date of its

original entry. But, said they, if the upper state court did assume jurisdiction, then the rule would apply.

The precise question in this *Andrews* case which was before this court was whether this court had jurisdiction, under the federal statute, of the judgment of the lower of the two state courts. This in turn depended upon the effective date for appeal. Now the jurisdiction of this court to take the case by writ of error was abolished by Act of Congress operative on November 6. The judgment in the lower state court was entered on June 16 and if it was then the final judgment, this court had jurisdiction. If it did not become final until some time after November 6, when the upper state court declined to act, then this court had no jurisdiction. This court held that the state judgment was not final for appeal until the upper state court rejected the petition for writ of error. It is important to note that the upper state court did not grant the petition for writ of error and then upon review sustain the lower judgment. It merely denied the petition for a writ of error. This procedure is parallel to the denial by the conciliator in the *Pfister* case of his application for rehearing.

Because the upper state court denied the *Andrews* petition for writ of error it was argued by the respondents in this court that the finality of the original judgment in the lower state court was never disturbed. This court held that if such argument prevailed it could not be ascertained until the action of the upper state court whether the decree was or was not final for appeal when it was originally entered. Exactly on that point this court said: "but the **existence** of the power and not the considerations moving to its **exercise** is the criterion by which to determine whether the judgment of the trial court was

final at the time of its apparent date or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality”.

This court characterized the argument presented to it as follows:

“The contention therefore that the judgment of the trial court was a final judgment susceptible of being here reviewed by writ of error must rest upon the impossible assumption that the finality of this judgment existed before the happening of the cause by which alone finality could be attributed to it.”

And later in the opinion this court said: “Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government and material therefore to the exercise by this court of its rightful authority”.

That this court recognized that the principle here discussed is equally applicable to rehearings is demonstrated by the opinion citing it in the later case of *Chicago v. Basham*, 1919, 249 U. S. 164; *Citizens v. Opperman*, 1919, 249 U. S. 248; and *Morse v. U. S.*, 1916, 270 U. S. 151. These citations are discussed below in their proper order.

18. *Citizens v. Opperman*, 1919, 249 U. S. 448.

It was held that not the original date of the judgment but the date when a petition to rehear it was overruled started the running of the time for appeal.

At page 449 this court said: “A petition to rehear was overruled May 18, 1917, and at that time the judgment be-

low became final for the purposes of review here". *Andrews v. Virginian* and *Chicago v. Basham* were cited.

Page 450: "Where a petition for rehearing is **entertained**, the judgment does not become final for purposes of review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from the date of such denial or other disposition".

Again it is seen that it was not required that the judgment be set aside.

19. *Chicago v. Basham*, 1919, 249 U. S. 164.

A judgment was entered on November 26. On April 17 of the next year a petition for rehearing was overruled and on December 18 a second petition for rehearing was overruled. This court held that the judgment became final for the purpose of appeal to this court when the second petition for rehearing was overruled. Page 167: "It is only a judgment marking the conclusion of the course of the litigation in the courts of the state that is subjected to our review. Hence, whatever its forms of finality, if a judgment is in fact **subject to reconsideration** and review by the state court of last resort, through a medium of a petition for rehearing and such a petition is presented to and **entertained** and considered by that court, we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed of and until then the judgment previously rendered can not be regarded as a final judgment within the meaning of the act of Congress". *Andrews v. Virginian* was cited. The original judgment was not set aside in either application for rehearing. The rehearing was merely denied.

20. *Morse v. United States*, 1926, 270 U. S. 151.

This case came from the court of claims where an express rule required that after one motion for a rehearing was denied, another might not be filed except by leave. After such a motion was denied, two motion for such leave were successively made and denied whereupon an appeal was taken, within the time prescribed if measured from the denial of the motions for leave, but long past such period if it began to run from the original denial of the original motion.

This court took some pains to distinguish between a motion for **leave** to file a motion for rehearing and a **motion** for rehearing and restated the well-settled rule that a motion for rehearing which is **entertained** by the court destroys the finality of the order so that time for appeal dates from the disposition of the application for rehearing. Page 153: "There is no doubt under the decisions and practice in this court that where a motion for new trial in a court of law or a petition for rehearing in a court of equity is duly and seasonably filed it suspends the running of time for taking a writ of error and appeal and that the time within which the procedure for review must be initiated begins from the date of the denial of either the motion or petition." *Brockett v. Brockett*, *Washington v. Rodley*, *Memphis v. Brown*, *Texas v. Murphy*, *Aspen v. Billings*, *Kingman v. Western*, *U. S. v. Ellicott*, *Andrews v. Virginian*, and *Chicago v. Basham* were cited.

Page 154: "Applications for leave did not suspend the running of the ninety days after the *denial of the motion for a new trial* within which the application for appeal must have been made." Here this court again recognized

the application of the rule. That is, the 90 days for appeal ran from the denial of the motion for rehearing, not from the original entry of the judgment. The judgment was not set aside. A motion to rehear it was merely denied.

In this *Pfister* case the petitioner did not file an application for leave to file the petition for rehearing. He filed his petition for rehearing which was denied.

21. *Gypsy v. Escoe*, 1939, 75 U. S. 498.

This case is quoted in Note 7 of this *Pfister* decision as authority for the statement that "Where a petition for rehearing is filed before the time for petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins from the date of the denial of the petition for rehearing".

This *Gypsy* case is in direct conflict with the implication of Note 7 just referred to, for the reason that the court dismissed certiorari in this *Gypsy* case because as it said: "On September 30, 1927, more than three months after denial of the petition for rehearing (June 14) the present petition for certiorari was filed". This court went on however to suggest to the petitioner how it might file a timely petition for certiorari by going back into the state court and filing another petition for rehearing. Of course the suggested petition for rehearing would be filed far beyond the period for filing petition for certiorari because the instant petition for certiorari was expressly denied because three months had elapsed. Therefore, any other rehearing application would be much more over time.

22. *U. S. v. Seminole*, 1937, 299 U. S. 417.

A motion for rehearing was filed, and it was denied on the very last day of the three months for appeal. This started the three months running again. Two and a half months later a second motion for rehearing was filed, by leave, and it was denied six months and one week after the original entry of the judgment. A month still later an appeal was taken.

The petition for certiorari was filed in this court within time if it dated from the overruling of the second motion for rehearing. It was out of time if dated from the denial of the first motion. Of course, it was much farther beyond the original entry of the judgment. After considering this situation and applying the rule this court held at page 421: "This court has jurisdiction".

In this *Seminole* case we have a situation in which the finality of the original judgment was twice suspended for appeal. First it was suspended by the motion for rehearing which was not decided until the end of the period for appeal. A short time before the expiration of the second extended period for appeal, measured from the overruling of the first application for rehearing, the second motion for rehearing was filed. It was overruled and the appeal was taken within that second period.

In neither of the applications for review in this *Seminole* case did the court first grant an application for rehearing and then adhere to its original judgment. Nor did it set aside its original judgment. In each instance, it merely denied the application for rehearing exactly as was done in the *Pfister* case.

This court said, page 421: "It is well settled that the time within which application may be made for review in this court does not commence to run until after disposition of motion for new trial seasonably made and determined". *Brockett v. Brockett*, *Texas v. Murphy*, *U. S. v. Ellicott*, *Citizens v. Opperman*, *Morse v. U. S.*, *Gypsy v. Escoe* were cited.

23. *Wayne v. Owens-Illinois*, 1937, 300 U. S. 131.

The scope and phrasing of the opinion in *Wayne v. Owens-Illinois*, 300 U. S. 131, was formed by the facts in that case but they did not limit or distort the general rule. It applied the rule to an unusual state of procedure. The discussion and the notes show that the court was sustaining the general rule and adapting it to the facts of the case.

The appellate court in the *Wayne* case had dismissed the appeal there because the rehearing had been applied for in the District Court after the time for appeal had expired.

The opinion states that the question was whether the general rule operates when a rehearing is set in motion. "After the expiration of the period . . . for appeal". And the opinion continued: "To resolve a conflict of decision we granted certiorari", pages 132, 133. Note 2 on page 133 lists the decisions conflicting with the decision on which certiorari was granted. They are:

West v. McLaughlin, 1908, CCA 6, 162 Fed. 124. The period for appeal was ten days. Forty-nine days after the District Court entered an order, a petition for rehearing was filed. After consideration of the petition for rehear-

ing the District Court adhered to its original order. The Appellate Court sustained the appeal.

Cameron v. National, 1921, CCA 8 (not CCA 2) 272 Fed. 874. The period for appeal was ten days. Fourteen days after the District Court entered its order a motion to vacate was filed and granted. Upon rehearing the order was reentered. An appeal was taken. The appellate court held it had jurisdiction of the appeal. It cited in support of its decision its former decision in *Todd v. Alden*, CCA 8, 245 Fed. 462, where it had held that when a rehearing was denied the time for appeal ran from the denial.

Conboy v. First, 1906, 203 U. S. 141, Note 2 said, "adverted to the question without deciding it". In that case a petition for rehearing filed in the Circuit Court of Appeals after the thirty days for appeal was denied and this court denied an appeal. (This *Conboy* opinion is discussed in this petition for rehearing at page 16.

In the *Wayne* case the issue was, could the bankruptcy court still exercise its power over its judgment **if the application for such exercise was filed after time for appeal**. This court held that it could, saying "There is no controlling reason . . . for limiting its exercise to the period allowed for appeal". Page 137. The issue was not, should a court proceed by first setting aside its order and upon reconsideration adhere to it and reenter it, or did the court in the instant case accomplish the same end by merely denying an application for rehearing. It was **not that procedural element**. The issue was the **time element**.

V.

Comment Upon the Application of the Foregoing Twenty-three Decisions of this Court to the Pfister Case.

There is not an element **present** in the Pfister procedure relating to the petitions for rehearing, nor an element **lacking**, that would withhold the application to them of the general rule so firmly established in the long history of judicial opinions by this court through almost a century. That rule, restating it, is: A petition for rehearing which is entertained by a court and denied suspends the time for appeal so that it runs, not from the entry of the order to which it is directed, but from the denial of the application for rehearing.

VI.

The basis of the rule is the EXISTENCE of the Power of a Court and Not Its EXERCISE.

The general rule, that a petition for rehearing which is entertained by the court and denied tolls the time for appeal, rests upon the **existence** of the power of a court to set aside its judgment, not upon the **exercise** of that power. When a court has **entertained** an application for rehearing it has indicated that it has invoked the **power**. The genesis of the subject is the ancient doctrine that a judgment remains "during the term in the breast of the court." Blackstone's Commentaries, Book III, page 407. During term the judge is perfectly free to look again into his action. If he "**entertains**" a suggestion that he do so, the judgment is not final until he indicates whether he will or will not revise his action. If he refuses to en-

ertain or consider the motion, the finality of the judgment is not disturbed. It is within the judge's discretion whether he will change the judgment and his action is not subject to appeal. But while he is considering what to do, that is entertaining the motion, the finality of the judgment is suspended.

"The court below while such a motion is pending, has not lost its jurisdiction over the case, and having power to grant the motion, the judgment is not final" . . . "it was **entertained** by the court, argued by counsel without objection and passed upon." *Kingman v. Western*, 1893, 175 U. S. 675.

In the case from which these quotations from the opinion are taken, **the lower court did not grant a rehearing, it denied it**. That is, it did not grant a rehearing and after rehearing adhere to its original order; nor did it grant a rehearing, vacate the original order and then reinstate it. It merely denied a rehearing after considering it.

This distinction between the **existence** of the power to grant a rehearing and the **exercise** of that power is not a mere scholastic subtlety. Its disregard would be fraught with dire consequences precisely because, as suggested in this Pfister opinion, it could not be known whether the original entry of the final order, or the action upon the application for rehearing, would date the running of the time for appeal. That would be because only the **form** of the order upon the application for rehearing "would show either a **refusal to allow the petition for rehearing** or a **refusal to modify the original order**." - Quoted from the Pfister printed opinion, bottom of page 5.

This court has already carefully considered this primary distinction. It rejected the argument that the **nature of the order of the court upon an application for rehearing should determine when time for appeal starts to run.** It held that if such argument prevailed it could not be ascertained, until it was too late, whether the original decree was or was not final. After stating that the decision to review was discretionary and not obligatory, this court said in *Andrews v. Virginian*, 1919, 248 U. S. 272, at page 275:

"But the **existence** of the power and not the considerations moving to its **exercise** is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality."

This court characterized the argument presented to it as follows:

"The contention therefore that the judgment of the trial court was a final judgment, susceptible of being here reviewed by writ of error, must rest upon the impossible assumption that **the finality of that judgment existed before the happening of the cause by which alone finality could be attributed to it.**"

"Nor," continued that opinion, "is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material therefore, to the exercise by this court of its rightful authority."

The demarkation between: on the one hand, **considering whether a motion for rehearing should be granted,** and on the other, **considering the original matters which lead to**

the original judgment, is usually so indefinite that no practical distinction can be made. **Actually the same general subject is involved and whatever discussion or consideration is pertinent to the one is also pertinent to the other.** The conciliation commissioner states that he considered the whole matter and he did so. Both parties filed pleadings and argued. Motions to dismiss the application for rehearing were made and denied. He considered each motion for rehearing fully and denied it. R. 13, entry of November 28, 1940; R. 109 to 116; R. 158 to 164. R. 88 to 97. R. 97 to 105. R. 139 to 147. R. 148 to 149. The finality of each order was thereby suspended.

VII.

"Courts Must look for light beyond the law books to the experience of the world."

Issues arising within the perview of the farmer debtor law can not be considered apart from the heat and passion of the conflict aroused by it. Unless "the courts . . . look for light beyond the law books to the experience of the world in which we live", the purpose of Section 75 as intended by the legislative arm of the government will inevitably be defeated.

When this court finally determined the constitutionality of Section 77 for railroad debtors, of Section 77B for corporation debtors, and of Section 81 for municipal debtors, these laws were from then on recognized as the laws of the land and they have been faithfully executed. Not so with the farmer debtor law which is far less stringent than the other three. It has been the subject of persistent and vehement opposition in every grade of federal and state

courts. This court itself has twice changed its previous decisions on Section 75. *Wright v. Union Central*, 1940, 311 U. S. 73, overruled *Louisville v. Radford*, 295 U. S. 555. Note 3 in *John Hancock v. Bartels*, 308 U. S. 180, 184, repudiated Note 6 in *Wright v. Vinton*, 300 U. S. 440, 462.

. All of this stress and strain arises out of the unceasing opposition to the law and all its implications by certain elements of the nation. This opposition is founded upon the mudsill theory of society according to which there must be one stratum to be exploited by the "higher" social strata. American farmers will not occupy that role. The opposition does not remember that the beginning of the agricultural depression in 1920 finally, by 1929, pulled down the entire economic structure of the nation. It refuses to recognize that all life is based upon, grows out of, agriculture, the only industry which creates wealth out of air and sunlight.

Besides all the undisclosed sources of opposition, which are none the less effective, the following have been uncovered.

1. Referees in bankruptcy, including many conciliation commissioners who often simultaneously occupy both positions as in this case, have actively opposed the farmer debtor law. It prescribes a total of only \$60 for conciliation commissioner fees, (\$25 under Section 75 (a) to (r) and \$35 under Section 75 (s)), whereas in the regular bankruptcy the referee is compensated by percentage fees on funds of the estate for every separate act he performs.

See the statement of Herbert M. Bierce, Secretary of the National Association of Referees in Bankruptcy, before the special subcommittee on bankruptcy of the Committee

of the Judiciary (House of Representatives) 75th Congress, December 17, 1937, to January 7, 1938. Report, pages 43 to 50.

Also the statement of Fred H. Kruse, referee, in bankruptcy and conciliation commissioner. Same document, pages 35 to 43.

2. Commercial lawyers are also opposed to the farmer debtor law. It provides no fees for receivers or their attorneys for the statute requires any receiver to be discharged. No trustee is provided except in the extraordinary instance where at the end of the proceeding a trustee may, for contumacious conduct of the farmer debtor, be appointed to wind it up. Section 75 (s) (3). *Wright v. Union Central*, 1940, 311 U. S. 273, 280. Such trustee's fee would be nominal and an attorney for the trustee ordinarily unnecessary.

See the statement of Jacob I. Weinstein, commercial lawyer. Same Hearing Report, pages 14 to 35. Especially at page 24, first paragraph under heading 9 and the last half of page 32. Also see the first paragraph on page 64.

3. Particularly conspicuous has been the strenuous opposition of the Federal Land Banks which were set up to solve the farmer debt problems more than twenty years before Section 75 was enacted. By the Land Bank System the Federal Land Banks are guaranteed a flat one per cent of the interest charged on every farm loan. That is, if the land bank bonds sell for three per cent the farmer pays four. Their source of loan funds has been provided by government credit. The twelve Federal Farm Loan Banks are huge financial institutions whose permanent le-

gal staffs continuously engage in a race with individual farmer debtors who are poorly equipped for such antagonists.

See the statement of General Counsel Evans, Farm Credit Administration. Same Hearing Report, pages 75 to 132.

4. Life insurance companies have also strenuously opposed the farmer debtor law in all its works. A statement that one insurance company accumulated a profit of \$50,000,000 prior to 1937 from the resale of mortgaged farms which had been seized during the depression has never been denied. See the same Hearing Report page 56.

The source of the opposition is sometimes, at the moment, undisclosed. The Association of Life Insurance Presidents aided the opponents of the farmer debtor law in this court in *Louisville v. Radford*, 1935, 295 U. S. 555, by providing eminent counsel at a cost of \$63,790.63. Neither that association nor any of its represented companies had any direct or partisan interest in the case. The source of the opposition was not uncovered until after four years. See the Hearings before The Temporary National Economic Committee, 76th Congress, pages 4352 to 4355, 4746 and 4750. The amount spent was about fifteen times the value of the farmers estate.

5. Most unfortunately some federal courts have refused to permit farmers to come under Section 75. See the statement of Senator Frazier before the same Special Subcommittee on Bankruptcy, cited above in paragraphs 1 to 3, at page 3. Most members of the federal judiciary are more directly experienced with the economic and legal problems of corporations than of agriculture. Those who have not recently been actively engaged in farming can

have no conception of the complete revolution in farming practices and farm problems within the past quarter century.

Members of the legislative branch being familiar with the complaints of their constituents made special provisions for insuring the speedy and impartial administration of farmer debtor proceedings. They provided that a conciliation commission shall be appointed for each county. Section 75 (a). General Order 50 (2). That none but a \$10 fee shall be paid by the farmer debtor. Section 75 (b), (s)(4). That he may file his petition or amended petition with the conciliation commissioner or with the clerk of the court. Section 75 (c), (n). That the filing of his petition takes away the jurisdiction of all other courts. Section 75 (n), (o), (p). That rehabilitation is based upon present security value regardless of the excess of the secured debts. Section 75 (k). Section 75 (s), first (unnumbered) paragraph. Section 75 (s)(3). That the conciliation commissioner shall assist the farmer debtor throughout the proceeding and no attorney shall be required. Section 75 (q). That he may invoke the moratorium even if his proposal should be accepted and confirmed. Section 75 (s), first sentence. That he shall retain possession. Section 75 (s)(2). That rent shall be the usual customary rate of the community based upon rental value, net income and earning capacity. Section 75 (s)(2). That property reasonably necessary for farming shall not be sold. Section 75 (s)(2). That any sale of his property or extra payments shall be consistent with his ability to pay and his rehabilitation. Section 75 (s)(2). That there shall be no sale until he has had opportunity to redeem at the security value. Section 75 (s)(3). *Wright v. Union Central*, 1940, 311 U. S. 273. That his proceeding shall not

be dismissed except for his own contumacious conduct. Section 75 (s)(3). *John Hancock v. Bartels*, 1939, 308 U. S. 180. *Wright v. Union Central*, 1941, 311 U. S. 273. That payments on principal shall be deducted from the redemption value. Section 75 (s)(3). That if his estate be sold he shall have ninety days to redeem it. Section 75 (s)(3). That there shall be no receivership, nor, except under exceptional circumstances, any trusteeship. Section 75 (s)(3). Section 75 (s)(4). That fractional interests may be brought under the law severally or jointly. Section 75 (s)(4). *Mangus v. Miller*, decided December 7, 1942, U. S. That any farmer debtor case dismissed because of this court's holding in *Louisville v. Radford*, 1935, 295 U. S. 555, should be reinstated. Section 75 (s)(5). That upon request a farmer's regular bankruptcy case shall be transferred to Section 75. Section 75 (s)(5). That discharge in regular bankruptcy shall not bar a farmer debtor proceeding. Section 75 (s)(5).

When farmer debtors read Section 75 (and most of them do) they rely implicitly upon its provisions because they have faith in the power of their government. They especially rely upon the impartial protection and assistance of the conciliation commissioner implied in Section 75(q). To them it is inconceivable that they should be entrapped by the subtleties of law courts. Their laws proscribes procedures of regular bankruptcy proceedings in which the creditors control the estate, and it is administered in the creditors' interests. Especially onerous are actions in the administration of farmer debtor proceedings of which the following are only samples of what is constantly going on in hostile atmospheres: The entry of an order upon a motion introduced and granted the same day without notice (as here, R. 9, extra principal payments of \$6375); reference of a proceeding to a conciliation commissioner of another coun-

ty; a motion presented to a conciliation commissioner and heard later by the judge without prior notice of either filing or hearing; retroactive orders; dating orders without entering them or entering them long after their purported entry; issuing orders without notice; revaluing a farm for redemption at four or five times its original appraisal in the same proceeding; setting or adjourning meetings at the convenience of creditors and refusing the same to the farmer debtor, issuing illegal orders and ordering liquidation for noncompliance; holding that this court may not "take away" the "right" of dismissal; dismissing a proceeding without hearing upon the recommendation of a conciliation commissioner without notice of either; issuing a stay order and contemporaneously ordering redemption within a few months; recommending dismissal of a proceeding because a proposal does not provide for payment of secured debts in full; assessing costs above the \$10 maximum provided; refusing to rent all the farm property to him; authorizing sale in foreclosure without his knowledge or notice; appointing a trustee to serve throughout the proceeding; taking from him the possession of his property under section 75 (a) to (r); seizing and appropriating all farm proceeds; notifying produce purchasers that the estate is in bankruptcy; refusing to ask or to renounce reappraisal so he may know the valuation for redemption; interfering with his tenants and employees; refusal to pay for upkeep of the farm property out of rent; permitting creditors to say whether upkeep or taxes shall be paid; saying "whatever is all right with the creditors is all right with me"; ordering an estate sold because a conciliation commissioner has failed to transmit a certificate on a petition for review; permitting numerous successive applications for dismissal to be heard. These are but samples of what farmer debtors have to meet in a hostile or at best, unsympathetic, atmosphere.

In altogether too many instances the record shows, upon its face, that the proceeding has followed the due course of the law whereas in fact it was not so conducted.

VIII.

The Experience of the World Applied to Mr. Pfister's Case.

The only thing decided by the District Court was that it was "without jurisdiction". R. 175, top of page. R. 177, middle of page. The appellate court sustained the district court saying "The District Court followed the statute and it had no power to do otherwise." R. 214, bottom of page. This court disagreed with the appellate court holding that the District Court had power to review. The District Court and the Appellate Court are reversed upon the only issue in the case.

The Appellate Court excursed far beyond the issue in several directions and returned with the conclusion that if the district court had had jurisdiction, it would have sustained the conciliation commissioner's two orders which were the subjects of the petitions for review. R. 209, 215. The opinion of this court also went beyond what was "essential to the opinion" and held that if the district court had exercised its jurisdiction and reviewed the orders, it would have sustained them. This conclusion is vital to the petitioner's rights and will be examined.

It is unfortunate that the excursive discussions of the appellate court included more subjects than could be adequately presented and considered in this court. It is significant that in its excursions the Appellate Court, and likewise this court in its opinion, did not mention the heart and

substance of the disputed issues that would have been adequately presented to the district court but could not be there presented because **the District Court held it had no jurisdiction.**

The District Court is a court of primary and general jurisdiction over the entire proceeding within the limits of the statute. Its conciliation commissioner is but an arm of the court. **It could reexamine into the whole case from start to finish.** A bankruptcy case is one suit from beginning to end and the bankruptcy court is always open to consider or reconsider any subject of the suit. *Sandusky v. National Bank*, 1875, 90 U. S. (23 Wall.) 289, 292. It could hear evidence fully; the Appellate Court could not. The Appellate Court went far beyond its jurisdiction when it excursions into the field of what **might have been** and the result in the District Court if it had had jurisdiction. The result reached by the Appellate Court is erroneous because if the District Court has jurisdiction, as this court says it has, what the Appellate Court surmised would have been, would **not have been.** The Appellate Court had no right to predetermine the District Court's conclusion, especially so because this court has held that the Appellate Court's legal conclusion was false. This court is subject to the same limitation. It can not now decide what the record would be after the District Court should comply with this court's final determination that it has full power to consider the petitions for review.

The significant facts upon which petitions for review were designed to operate and which have not been mentioned by either reviewing court are:

1. The entire estate consists of an 80 acre, 18 cow, dairy farm. R. 70 to 72.

2. The total appraised value of the real estate was \$16,000; of the personal property including exemptions \$2471. The cows were appraised at \$65 each. R. 70 to 72. From this appraisal it is seen that those eighteen cows valued at \$1170 for the whole of them, were the sole income producing property. It is common knowledge that a dairy cow produces milk only following the birth of a calf; that nine months is the period of gestation; and that a cow must have a rest period averaging two months per year or one-sixth of the time. That is, there would be about fifteen producing cows at a time. It is also common knowledge that the flow of milk is greatest at freshening and decreases until she is dried up preceding the beginning of the next lactation period.

3. The conciliation commissioner's orders required:

- (1) rent at \$6375 to be paid within two years, eight months and thirteen days. R. 72 to 77.
- (2) additional payments of \$6375 to be paid within the same period. R. 72 to 77.

This was a total of \$12,750, or more than **thirteen times** the value of the producing cows, to be produced in two years, eight months and thirteen days, or a "net income" dividend, based upon the value of the eighteen cows, of 402 per cent per year! Each cow would have to produce a "net income" dividend of over 480 per cent per year!

Section 75(s)(2) makes the rent to be based upon the "**rental value, net income and earning capacity.**" The whole of this rent is payable to the court. All expenses and the farm family's living must come from the gross income before the "net income" is paid to the court. (No distinction may be made as to the "additional payments" because they must come from exactly the same source, the "net income".)

3. A few days later the conciliation commissioner ordered the cattle, horses, hogs, farm machinery, and crops be sold as "perishable property," "not reasonably necessary for the farming operation" and "not inconsistent with . . . the debtor's ability to pay with a view to his financial rehabilitation." Section 75(s)(2).

The mere recital of these facts: (1) an 80 acre, 18 cow dairy farm; (2) payments of \$12,750 in two years, eight months and thirteen days, from net income and earning capacity, to any farmer invariably elicits more than vehement expostulation.

When there is added (3) the order to sell livestock, implements and crops as "perishable" the elicitation exceeds all description.

It is most respectfully, but most earnestly urged that there never was an instance where "Equal Justice Under Law" more pressingly than in this case required that "the courts must henceforth, far more than in the past, look for light beyond the law books to the experience of the world in which we live." Quoted from the statement of the Chief Justice at the Memorial Tribute to Justice Brandeis.

Both the conciliation commissioner and the appellate court "looked for light beyond the law books" but they looked in dark and most peculiar places. For instance they said:

"In passing, it must be said of the debtor that he is an unusually intelligent man, having at one time been President of the Pure Milk Association of the Chicago area." Conciliation Commissioner's opinion, R. 115.

Which, being paraphrased, is again "And, sure he is an honorable man: Look, in this place ran Cassius' dagger through."

"The debtor was an ignorant man, for at one time he had been president of the Pure Milk Association of the Chicago Area." Appellate Opinion, R. 215.

Ergo, (let us be consistent), the President of the Chicago Bar Association, being, also therefore, "a very intelligent man," must know how to milk a cow! And how to run a dairy! There is no more logic in holding a lawyer to dairy knowledge than there is of expecting a dairy farmer to know how to conduct his farmer debtor proceeding.

But says the conciliation commissioner again:

"Any court must necessarily require the business of its office to be conducted through attorneys, so that an orderly procedure may be followed." R. 163.

It is apparent that the conciliation commissioner did not take to heart Section 75(q): "farmers shall not be required to be represented by any attorney in any proceeding under this section." Nor the provision of the same subsection (q) that upon request the conciliation commissioner shall assist the farmer in **all matters** arising under Section 75.

The two opinions of the conciliation commissioner and that of the Appellate Court abound with gems of equal lustre. e.g. The conciliation commissioner says he set a "rental and fixed the principal payments at amounts which were **substantially less than the maximum amount suggested by the debtor's own counsel.**" R. 162. That is, the farmer debtor's counsel suggested a total of rent and principal payments even higher than the **\$12,750 ordered to be paid in two years, eight months and thirteen days!** Thus the conciliation commissioner "assisted the farmer."

Again the conciliation commissioner says anent Attorney Dazey who was suffering from apoplexy with a blood pressure as high as 232 that "If he did not feel able to carry on his work, he had an abundance of time to engage other counsel". R. 115.

These examples of many other instances in the record show the hostile atmosphere in which this farmer debtor proceeding was immersed. This atmosphere was epitomised by the slogan: "What is all right with the creditors is all right with me"—a guide more applicable to a regular bankruptcy proceeding, but anathema to a farmer debtor proceeding.

This proceeding was by statute intrusted to a court of equity. A court of equity should look at the substance, not at the form. A court of equity does justice, it does not catch on technicalities.

In the opinion there occur the following inaccuracies of factual statements:

1. Page 2 of the printed opinion: "On September 7, 1940, orders were entered for the sale of certain property, chiefly livestock, **stipulated by the debtor to be perishable under Section 75(s)(2).**"

2. Page 6 of the printed opinion: Referring to the "orders of September 7," "They were orders for sales of perishable property, Section 75(s)(2), **stipulated to be perishable by counsel for the debtor.**"

There was no such stipulation. None is set out in the record. There is a reference to a "stipulation" in the entry of August 13 at R. 9.

The entry of September 7, 1940, shows the orders resulted from petitions therefor. R. 10. These petitions did not allege any "stipulation". R. 42 to 65.

The order on Hartman's petition alleges that the farmer debtor through his attorney, Coulson, "having stipulated" that the cows were perishable under Section 75(s)(2). R. 78, paragraph 2. The order on the Bank's petition does not refer to any claimed "stipulation" or to "perishable." R. 80 to 82. The order on the Northern Illinois' petition alleges that the farmer debtor through his Attorney Coulson "has stipulated" that the dairy cattle are perishable under Section 75(s)(2). R. 82 to 88.

At his first opportunity the farmer debtor in his petition for Emergency Restraining Order, stated that no stipulation, consent or admission was ever made that the cows or any other property was perishable within Section 75(s)(2). R. 32, paragraph 10. This statement was verified by Attorney Coulson and by the farmer debtor. R. 33, bottom of page. R. 34, top of page. He repeated this statement in his petition for rehearing to the conciliation commissioner which he verified and the affidavit of Attorney Coulson was a part of it. R. 93, paragraph 7. R. 94 and 95.

Attorney Coulson made a separate affidavit that he did not stipulate or agree that any of the cows were perishable. He said he was asked whether the cows were perishable and "he answered that if they meant to ask him whether the cows would die, he would answer yes." R. 94 and 95.

Although present counsel for the farmer debtor did not participate in the proceeding until after the alleged orders of September 7, 1940, were supposed to have been entered (on the same date), he is personally convinced that

they were not so entered. His considered reasons for his conclusion are stated on pages 18 to 23 of the "Reply Brief for Petitioner" filed in this court in October 1942. They are there traced through the record. These record facts can not be gainsaid. The record nowhere shows service of this, (or these) orders, of September 7 on the farmer debtor or on his counsel. The record presents very slender evidence indeed which would support the emasculation of the very heart of the statute—that is **possession in the farmer debtor in order to accomplish his rehabilitation.**

It may be asked: By what legal doctrine does a statement in an order, approved by his opponent but not approved by him and never submitted to him, become evidence against him?

IX.

Some Portions of the Opinion Examined.

1.

Anent Note 7 at page 4 of the Pfister opinion which cites the foregoing Seminole decision (*U. S. v. Seminole*, 299 U. S. 417), as authority for the following statement:

"Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time, and limitation upon proceedings for review begins to run from the date of the denial of the petition for rehearing."

It is pertinent to call attention to the fact that the contemporaneous opinion in this case of *Wayne v. Owens-Illinois*, 1937, 300 U. S. 131, 137, says:

¹ The Seminole case was argued December 10, 1936, decided January 4, 1937. The Wayne case was argued January 7, 1937, decided February 13, 1937.

"But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. **There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal.**"

2.

Pfister opinion, page 4, bottom of page:

"When such a petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39(c) begins to run from that entry." Citing *Bowman v. Lopereno*, 311 U. S. 262, 266, and *Wayne v. Owens*, 300 U. S. 131, 137, 138.

This statement just quoted is true but **it is not a statement of the whole truth.** It comes **within** the rule but it **does not prescribe the limitation of the rule.** It is quite true that "when the issues of the original order are reexamined" the finality of that order is suspended. But it is not necessary to go that far.

It is not necessary for the operation of the rule that there shall be a rehearing of the evidence which preceded the order, and which supplied the judicial material upon which the order was constructed, or that new evidence shall be submitted. It is sufficient if the court shall consider whether it is going to entertain the motion for rehearing. An examination of the cases cited to support the above quoted statement shows that the quoted statement does not contain the limitations of the rule.

We proceed to examine the two cases cited at page 4 of the opinion in the quotation set out above:

Bowman v. Lopereno, 311 U. S. 262, 266. The sole question was whether an appeal was taken in time. The answer depended upon whether a motion for rehearing, entertained by the District Court, suspended the time for appeal.

Before quoting the language of the *Bowman* opinion at page 266, it is necessary first to quote the facts on which it is founded. These facts appear at pages 264 and 265.

Page 264: "November 15, 1937, the debtor filed a petition for rehearing . . . **On the same day** the judge of the District Court endorsed on the petition: 'This petition having been "seasonably presented" and "entertained" by the above entitled court, **permission to file same** is hereby granted.'"

Page 265: February 17, 1938. "The petition for review [rehearing] is denied."

Note that there was **no examination of the issues of the original order**. All the endorsement did was to grant **permission to file** the petition for rehearing.

The Pfister situation comes within this same circle for the conciliation commissioner, although no formal "permission to file" was entered, denied motions to dismiss on the ground that the applications for rehearing were filed out of time and therefore there existed no jurisdiction to hear them. (One of the motions to dismiss and the denial appear in the record. R. 148, 149. The other motion was orally made and denied.) This corresponds with the formal "permission to file" in the *Bowman v. Lopereno* case. Furthermore this court has expressly held that when such a motion for rehearing is filed, argued and

considered, a formal leave to file it is not necessary. *Aspen v. Billings*, 1893, 150 U. S. 31. *Kingman v. Western*, 1893, 170 U. S. 675.

Here is what this court said about the above facts in *Bowman v. Lopereno*, at page 266 of *Bowman v. Lopereno*:

"Treating . . . the petition of November 15, 1937, as a second petition for rehearing filed out of time, the endorsement upon the latter by a judge of the court, and hearing held and opinion announced upon it, show that it was entertained by the court and dealt with upon its merits"

"These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, can not operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."

Three citations are given in Note 4 of the opinion at page 266 of *Bowman v. Lopereno* to support the above quotations. They are:

- (1) *Voorhees v. Noye*, 1894, 151 U. S. 135, 137. A motion for rehearing was filed and ten months later it was argued and taken under consideration. After two months (twelve months in all) it was reargued. The court then denied the motion, holding "it is now too late to sustain said motion or to interfere with the decree." There was no examination of the issues of the original order. The court said it was "too late." This court held that the denial dated the time for appeal "because the application for rehearing was **entertained** by the court" citing *Aspen v. Billings*, 150 U. S. 31, which in turn cited

Brockett v. Brockett, 43 U. S. (2 How.) 238; *Texas v. Murphy*, 111 U. S. 488, and *Memphis v. Brown*, 94 U. S. (4 Otto) 715, in none of which was the original judgment examined. In each instance the application for rehearing was merely denied.

(2) *Gypsy v. Escor*, 1939, 275 U. S. 498. This court suggested that if a second petition for rehearing "is actually **entertained**" by the state supreme court, the time for seeking certiorari would run from the denial of such petition for rehearing.

(3) *Wayne v. Owens*, 311 U. S. 137, 138. "On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

The *Wayne v. Owens* opinion cites four decisions to support the above quotation. They are *Aspen v. Billings*, *Voorhees v. Noye*, *Citizens v. Opperman*, and *Morse v. U. S.* (These four cases are discussed at pages 11, 12, 22; and 24 of this petition for rehearing). In none of them was the original judgment examined. In each the motion for rehearing was merely denied.

3.

Pfister opinion, page 5, middle of page:

"On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts if any are offered support, grounds for opening the original order and determines that no grounds for

a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended."

There are three citations cited to support the above quotation. They are *Bernards v. Johnson*, 314 U. S. 19, 31; *Bowman v. Lopereno*, 311 U. S. 262, and *Chapman v. Federal*, CCA 6, 117 Fed. (2d) 321, 324.

(1) *Bernards v. Johnson*, 314 U. S. 19, 31. The record, says the opinion, is "long and complicated." To specify the dates of filings (sixty-two in all through a period of six years) with a mere designation of each would consume two pages or more. A large number of these were orders which were never appealed. No motion for rehearing was ever filed. This court in enumerating the issues brought before it said, at page 30: "The District Court disposed of three distinct matters in the orders under review" . . . the first of which is the only one pertinent here, namely: "The petition for review of the commissioner's orders of January 11, 1937." That conciliation commissioner's order of January 11, 1937, was an order dismissing a petition filed with him on January 4, 1937, which was **not a petition for rehearing**. He dismissed it on the ground that all requests in it had once before been adjudicated and become final. There was no hearing. Nothing was considered. The conciliation commissioner refused to entertain the petition. Upon review the District Court sustained the conciliation commissioner's dismissal. This court at page 30 of the opinion said: "The court [i.e. the District Court] clearly affirmed the Commissioner's

refusal to consider the petition for the reason stated by him."

Bernards v. Johnson does not impinge upon the rule that a petition for rehearing, entertained, or considered, by a court suspends the finality of the order to which it is directed until it is acted upon. The factual situation is not akin to that in the Pfister proceeding where (1) petitions for rehearing were filed. R. 88 to 97. R. 139 to 147. (2) Answers to them were filed. R. 97 to 105. R. 151 to 157. (3) Motions to dismiss them for lack of jurisdiction were filed and denied. R. 148, R. 149. (A companion order to dismiss on the same ground and its denial were verbal and do not appear in the record. Their occurrence has never been denied.) (4) The conciliation commissioner "considered" the "entire proceeding." R. 13, entry of November 28, 1946. R. 109 to 116. R. 158 to 164. No application for rehearing in all the cases on the subject of rehearing was so fully and completely considered and entertained as these Pfister petitions for rehearing.

(2) *Bowman v. Lopereno*; 311 U. S. 262; "and cases cited." This opinion has been fully discussed at page 48 of this petition for rehearing. The "cases cited" in that opinion have there and elsewhere also been fully discussed in this brief. They are *Morse v. U. S.*, *Wayne v. Owens*, *Voorhees v. Noye*, and *Gypsy v. Escoe*. (See pages 24, 27, 25 and 12 of this petition for rehearing.) The consideration of the petitions for rehearing in the Pfister case was far more extensive than that given to similar applications in any of the cited cases.

(3) *Chapman v. Federal*, CCA 6, 117 Fed. (2d) 321, 324. No time will be wasted on this opinion. It is loose and illogical. No court has ever questioned the rule that the denial of an application for rehearing is a discre-

tionary order and not subject to appeal. Every decision of this court there cited fails to support that opinion except the *Conboy* case which has never been followed and which assumed to follow decisions of this court which were *contra*. There were two appeals in the *Chapman* case involving the same real estate. One was the farmer debtor petition of the father as administrator and personal representative of the deceased owner. The other was a companion petition filed by the father and sons as heirs of the deceased owner. The appellate court sustained the personal representative's proceeding and the other was moot and aborted by the portion of the opinion applicable to it. The right to have the estate and its debts administered in a farmer debtor proceeding was fully sustained.

4.

The opinion in this *Pfister* case says, at the beginning of the last paragraph on page 5 of the printed opinion:

"If a **consideration of the reasons** for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the **mere filing** of an out of time petition would be enough."

It is the entertaining, that is the consideration—not the mere filing—of an application for rehearing which operates the rule. Every decision that this court has made upon the subject has required that **in addition to filing** an application for rehearing **it must be entertained**, that is considered, by the court. The burden is upon the movant to bring the motion to the attention of the court and thus to ascertain whether the court **entertains** it. It is the entertaining that invokes the power of the court. Whether or not the court will **entertain** the application and thus invoke its power is within the court's discretion. If the court re-

fuse to **entertain** the application, the applicant knows the appeal dates from the original order. There is thus no possibility for entrapment, either by the movant or by the nature of the court's ultimate action.

Any other method of operating the rule would make a game of legal procedure, and set a trap. The game would be to wait to see what **form** the final **exercise** of the court's **power** might take at the very end of a series of pleadings, hearings, findings of law and fact, and the order thereon.

Under the game theory:

◦ (1) If the final pronouncement took the form "Motion for rehearing granted. Original order adhered to," or "Motion for rehearing granted. Original order adhered to," or "Motion for rehearing granted. Original order set aside. Original order reinstated," the rule would operate and the time for appeal would then start to run.

(2) But if it took the form: "Motion for rehearing denied," the rule would not operate. But this result would not be known until then. The time for appeal would run from the original entry of the judgment and the right of appeal ordinarily would be lost.

There is no difference whatever in the substantive result between Form 1 and Form 2. Each leaves the original order intact. But the procedural result of Form 1 is the antithesis of the result of Form 2. By the rules of the game Form 1 would permit an appeal while Form 2 would not.

This court has considered and rejected this game theory. It characterized it as an "impossible assumption that the finality of that judgment existed before the happening

of the cause by which alone finality could be attributed to it." *Andrews v. Virginian*, 1911, 248 U. S. 272, at page 275. That is, under the game theory no assurance of finality could be attributed to a judgment until after the court indicated the **form** of its disposition of a motion for rehearing. The case just cited involved a petition to an upper state court to review the judgment of a lower state court which it denied. Subsequent opinions of this court have cited it and applied its reasoning to applications for rehearing. *Chicago v. Basham*, *Citizens v. Opperman*, *Morse v. U. S.* These four cases are discussed at pages 20, 22, 23 and 24 in this petition for rehearing.

CONCLUSION.

1. It seems clear that the petitioner, having had the only issue in his case decided in his favor, that is that the District Court has jurisdiction to hear his petitions for review, should have the right to have his case submitted to that court under its jurisdiction. This is especially true because only that court has unrestricted power to examine his whole case and do the justice that the situation developed will require.

2. It seems equally clear that the two petitions for rehearing made to the conciliation commissioner of the District Court invoked the rule, adhered to and developed by this court through a period of nearly a century, that the denial of a petition for rehearing of an order which petition for rehearing has been entertained by the court, suspends or tolls the time for appeal so that it runs from such denial.

3. It necessarily follows, if the foregoing statements are correct, that this case should be reheard.

Wherefore the petitioner prays that his petition for rehearing be granted.

ELMER McCLAIN, Lima Ohio,
Counsel for the Petitioner.

Lima, Ohio
January 4, 1943.

Certificate of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ELMER McCLAIN.

SUPREME COURT OF THE UNITED STATES.

Nos. 26 and 27.—OCTOBER TERM, 1942.

26 Henry Anton Pfister, Petitioner,
vs.
Northern Illinois Finance Corporation,
Algonquin State Bank, Hartman and
Son, et al.

On Writs of Certiorari to
the United States Circuit
of Appeals for the Sev-
enth Circuit.

27 Henry Anton Pfister, Petitioner,
vs.
Northern Illinois Finance Corporation,
Algonquin State Bank, Hartman and
Son, et al.

[November 16, 1942.]

Mr. Justice REED delivered the opinion of the Court.

This certiorari, 315 U. S. 795, brings here certain rulings on the right of petitioner, a farmer-debtor, to have reviewed the orders of a conciliation commissioner¹ under Section 75 of the Bankruptcy Act. This section deals with Agricultural Compositions and Extensions. A conflict of circuits as to whether the ten day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal,² impelled us to grant our writ. *In re Pfister*, 123 F. 2d 543, 548; *Thummess v. Von Hoffman*, 109 F. 2d 291, and *In re Albert*, 122 F. 2d 393.

In addition to this point numerous other questions as to the right to review are presented which may be fairly subsumed under petitioner's allegations of error below (1) because the courts did

¹ The referee appointed by the District Court for handling agricultural compositions is known as a conciliation commissioner. § 75(a)-(r). When the farmer seeks bankruptcy under (a) the conciliation commissioner acts as referee. § 75(s)(4). 49 Stat. 942.

² 52 Stat. 840, 858.

Section 39(c). "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. . . ."

not apply the limitation in the proviso of 75(s)* instead of that in 39(c); (2) because petitions for rehearing of a conciliation commissioner's orders, which petitions were entertained and denied, were not held to extend the period for review and (3) because the order of stay approved by the Commissioner under 75(s)(2) was for less than the statutory period of three years from the entry of the stay order.

After failing to obtain a composition or extension under Section 75(a) to (r) of the Bankruptcy Act, the petitioner, a farmer, sought relief under Section 75(s). In due course on August 10, 1940, he petitioned the Commissioner to fix his rent, permit him to retain his property and establish a stay or moratorium. In the petition he stated that his moratorium began to run on April 26, 1940. On August 13, 1940, the Commissioner, after hearing evidence upon its amount, ordered that the rental be fixed at a sum named, and directed a stay from April 26, 1940, as the petitioner suggested. An appraisal was approved by a separate order on the same day, August 13. On September 7, 1940, orders were entered for the sale of certain property, chiefly livestock, stipulated by the debtor to be perishable under Section 75(s)(2). After the ten days fixed for review under 39(c), petitions for rehearing on the orders fixing rental, granting stay and directing sale, were filed with the Commissioner. The basis of these petitions and the

* 49 Stat. 942, 943.

Section 75(s). "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

Six other subdivisions of subsection (s) follow, numbered (1) to (6), inclusive, and relate chiefly to proceedings after appraisal.

reasons for their denial by the Commissioner are detailed in division II of this opinion.

Petitions for review were filed which were timely if petitioner was right in his contention that the Commissioner's action on the petitions for rehearing extended the time for appeal for ten days from the entry of the Commissioner's order denying rehearing. The two numbers, 26 and 27, of our docket, refer to these two petitions for review consolidated for hearing. The District Court denied each of the petitions for review on the ground that there was no jurisdiction in it to review, since the petitions for review were filed after the ten days provided by 39(c) and the rules of the District Court and since the denial of the petitions for rehearing did not extend the time. The Court of Appeals affirmed the judgment on the grounds that 39(c) governed, that the time for review was not extended by the petitions for rehearing, that there was no basis for reversing the Commissioner's action on the petitions for review and that the "petitions for review were not filed in time." We disagree with the Court of Appeals upon the last ground on the assumption that the language meant that the District Court was without "power" to review the orders. We agree with the Court of Appeals upon the first three grounds and therefore affirm the judgment.

I. The proviso of subsection 75(s), note 3 *supra*, is, we think, limited in its effect to steps before commissioners authorized by the provisions of Section 75(s) which precede the proviso. Congress evidently intended to allow adequate time for reflection and preparation before appeal by parties aggrieved by the basic and difficult finding of value. The provisions of Section 75(s) following the proviso authorize orders setting aside exemptions, leaving the appraised property in the hands of the debtor and fixing rentals therefor, staying judicial proceedings, selling perishable property, directing reappraisals and final sale of the estate. It is obvious that this proviso, couched in terms of appeal, could not have been intended to control the review of the manifold activities of a commissioner engaged in handling an estate through three or more years of bankruptcy. To hold the proviso generally applicable would leave unregulated reviews of orders entered more than four months after the commissioner approves the appraisal. The section applicable to these reviews is Section 39(c).⁴

⁴ The legislative history of the proviso indicates the soundness of this conclusion. It appears first in the earlier subsection (s), 48 Stat. 1289, which

II. The petitions for review of the Commissioner's orders of August 13, 1940, and September 7, 1940, which were filed November 28, 1940, and October 9, 1940, no extension having been granted, were out of time under Section 39(c)⁵ unless, in accordance with the petitioner's contentions, the time for review was to run from the entry of the orders of the Commissioner denying the petitions for rehearing of the order of August 13, which petition was filed September 16, 1940, and of the orders of September 7, which petition was filed September 20, 1940. These orders of the Commissioner denying the petitions for rehearing were entered November 28, 1940, and September 30, 1940.

Where a petition for rehearing of a referee's order is permitted to be filed, after the expiration of the time for a petition for review, and during the pendency of the bankruptcy proceedings, as here, they may be acted on,⁶ that is, they may be granted "before rights have vested on the faith of the action," and the foundations of the original order may be reexamined: *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137.⁷ When such a petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39(c) begins to run from that entry. *Bourman v. Loperena*, 311 U. S. 262, 266;

was held unconstitutional in *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555. The preceding provisions were substantially the same as the present ones but the proviso read "That in case of real estate either party may file objections, exceptions, and appeals within one year from date of order approving appraisal." The specification of real estate, of course, excluded the proviso from any generality of scope. When the section was amended after the *Radford* case, the committee reports treated the paragraph of (a) as quoted in note 3 separately from the succeeding numbered paragraphs and the language connotes the idea that the proviso relates only to appeals from the appraisal. The comment is as follows: "It provides that the referee, under the jurisdiction of the court, shall designate and appoint appraisers, to appraise all of the property of the debtor, at its then fair and reasonable market value. The appraisal is made in all other respects, with rights of objections, exceptions, and appeals, in accordance with the Bankruptcy Act; and either party may file objections, exceptions, or take such appeals within 4 months. Surely there is no question of constitutionality up to this point." S. Rep. No. 985, 74th Cong., 1st Sess., p. 3; H. Rep. No. 1808, 74th Cong., 1st Sess., pp. 3-4.

⁵ See note 2, *supra*.

⁶ See the discussion in division III of this opinion.

⁷ Where a petition for rehearing is filed before the time for a petition for review has expired, it tolls the running of the time and limitation upon proceedings for review begins from the date of denial of the petition for rehearing. *Morse v. United States*, 270 U. S. 151, 153-4; *United States v. Seminole Nation*, 299 U. S. 417, 421; *Gypsy Oil Co. v. Escoe*, 275 U. S. 498.

Wayne Gas Co. v. Owens Co., 300 U. S. 131, 137-8. The reason for taking the later date for beginning the running of the time for review is that the opening of the earlier order by the court puts the basis of that earlier order again in issue. A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order refusing to modify the original. An appeal does not lie from the denial of a petition for rehearing. *Conboy v. First Nat. Bk. of Jersey City*, 203 U. S. 141, 145; *Bowman v. Loperena*, 311 U. S. 262, 266; *Brockett v. Brockett*, 2 How. 238; *Roemer v. Bernheim*, 132 U. S. 103; *Jones v. Thompson*, 128 F. 2d 888; *Missouri v. Todd*, 122 F. 2d 804.

On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts if any are offered support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.*

If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out of time petition would be enough. Of course, the court must examine the petition to see whether it should be granted. Indeed the examination given a motion to file such a petition might just as well be said to justify the advancement of the time for review. It is quite true that in a petition for review upon the ground of error in law in the original order, the examination of the grounds of the petition for rehearing is equivalent to a reexamination of the basis of the original decree. But in such a case the order on the petition for review would control. It would show either a refusal to allow the petition for rehearing or a refusal to modify the original order. Cf. *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137-38. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

* *Bernards v. Johnson*, 314 U. S. 19, 31; *Bowman v. Loperena*, 311 U. S. 262, and cases cited; *Chapman v. Federal Land Bank*, 117 F. 2d 321, 324.

In the present case it is quite plain the denial was grounded upon a failure of the petitions for rehearing to establish adequate grounds for the reexamination of the original orders. The petition for rehearing of the order of August 13, relating to rent, sought to produce evidence that the rental fixed was too high, raised a question of law that a full three years stay was not allowed and alleged a lack of representation by counsel. A motion to dismiss the petition for rehearing as out of time was denied. The Commissioner examined the petition for rehearing and determined that the debtor had had full opportunity to present his evidence at the hearing and that the stay was in accordance with the debtor's motion and that counsel for the debtor appeared at each hearing and knew of each order. He therefore concluded "that there is no equity or merit in the petition for rehearing" and denied the petition. The petition for rehearing of the orders of September 7 was similarly handled. They were orders for sales of perishable property, § 75(s) (2), stipulated to be perishable by counsel for the debtor. Rehearing was sought because of lack of representation by counsel and lack of notice of the orders. The Commissioner's decision on the petition for rehearing sets out the record facts showing representation and notice. We therefore conclude that the Commissioner did not reexamine the basis of any of the original orders and that time for filing the petitions for review was not extended.

III. Since the petitions for rehearing, in our opinion, did not extend the time for review, we are brought to examine the question as to whether Section 39(c), *supra* note 2, is a limitation on the power of the District Court to act or on the right of a party to seek review. Courts of bankruptcy are courts of equity without terms. Commissioners, like referees, masters and receivers, supervise estates under the eyes of the court with their orders subject to its review. The entire process of rehabilitation, reorganization or liquidation is open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights. Cf. *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137; *Bowman v. Loperena*, 311 U. S. 262, 266.

Prior to the adoption of 39(c), General Order in Bankruptcy No. XXVII,⁹ now abrogated,¹⁰ governed review of referee's orders

⁹ 172 U. S. 662.

¹⁰ Abrogated January 16, 1939, effective February 13, 1939. 305 U. S. 681.

but it prescribed no time limitations. It was held that petitions should be filed within a reasonable time.¹¹ Some local court rules therefore specified time limitations. Where such rules imposed definite limits on the time within which a petition for review could be filed, with extensions to be granted on cause shown, out of time petitions nevertheless were entertained and considered if cause was shown.¹²

Section 39(c) was intended to establish definitely and clearly the proceeding for review of a referee's order in the interest of certainty and uniformity but the legislative history reveals no intention to change the preexisting rule as to power.¹³ Indeed, the Chandler Act by the amendment to section 2(10)¹⁴ sought to conform the act to the prevailing practice as to the bankruptcy court's exercise of its appellate jurisdiction over referee's orders.¹⁵ We do not think section 39(c) was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. The power in the bankruptcy court to review orders of the referee is unqualifiedly given in Section 2(10). The language quoted from section 39(c) is rather a limitation on the "person aggrieved" to file such a petition as a matter of right.¹⁶

The review out of time of the Commissioner's orders is then a matter for the discretion of the District Court. As that Court

¹¹ *American Trust Co. v. W. S. Doig, Inc.*, 23 F. 2d 398; *Crim v. Woodford*, 136 F. 34; *Bacon v. Roberts*, 146 F. 729; *In re Grant*, 143 F. 661; *In re Foss*, 147 F. 790. 8 *Remington on Bankruptcy* (5th Ed. 1942) § 3704.

¹² *In re Oakland and Belgrade Silver Fox Ranch Co.*, 26 F. 2d 748; *In re T. M. Leasher & Son*, 176 F. 650; *Amick v. Hotz*, 101 F. 2d 311; *In re Wister*, 232 F. 898, affirmed 237 F. 793; see *Roberts Auto & Radio Supply Co. v. Dattle*, 44 F. 2d 159.

¹³ H. Rep. No. 1409, 75th Cong., 1st Sess., p. 11; Committee Print, H. R. 12889, 74th Cong., 2d Sess., 149-50.

¹⁴ Section 2(10) gives the bankruptcy court jurisdiction to "consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings." 52 Stat. 842. Whereas the subsection formerly read "consider and confirm, modify or overrule or return with instructions for further proceedings records and findings certified to them by referees." 30 Stat. 545.

¹⁵ H. Rep. No. 1409, *supra*, p. 19; S. Rep. No. 1916, 75th Cong., 3d Sess., p. 11, compare Committee Print, H. R. 12889, *supra*, p. 11.

¹⁶ *Thumness v. Von Hoffman*, 109 F. 2d 291; *In re Albert*, 122 F. 2d 393; *Boyun v. Johnson*, 127 F. 2d 491, 497, see *Biggs v. May*, 125 F. 2d 693, 696; *In re Loring*, 30 F. Supp. 758, 759. *Contra*, *In re Pfister*, 123 F. 2d 543, 548; *In re Parent*, 30 F. Supp. 943. Compare 2 *Collier on Bankruptcy* (14th ed. 1940) §§ 39.16, 39.20; 8 *Remington on Bankruptcy*, *supra*, § 3765.

was of the opinion it was "without jurisdiction" by virtue of section 39(a), its discretion was not exercised. However, as we are of the view that the petitions for rehearing were not supported by adequate facts justifying a reexamination of the bases for the orders of August 13 and September 7, 1940, and no others are alleged, and that therefore the District Court should not have entered into an out of time review of these original orders, there is no reason for a reversal of the judgments. The Commissioner upheld the petitions for rehearing against a motion to dismiss because they were out of time. He thereupon heard and passed upon the petition's merits as bases for rehearings. His reasons for refusing to open the original orders complained of are adequate and amply supported by the record. The appraisal was made and the time of stay fixed pursuant to the debtor's motion, he was represented by one or more counsel at each meeting, had opportunity to present evidence and stipulated to the perishable character of the property ordered sold. See the last paragraph of division II.

IV. On account of debtor's motion, requesting the running of the moratorium of three years from April 26, 1940, the day of his adjudication in bankruptcy under 75(s), we do not consider the correctness of a stay of less than three years under other circumstances. In this instance it was correct.

Affirmed.

A true copy.

Test: 

Clerk, Supreme Court, U. S.

